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No. 06-

# In the Supreme Court of the United States

COL. JEFFREY B. MILLER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, PENNSYLVANIA STATE POLICE,

*Petitioner*

*v.*

CONCHATTA, INC., T/D/B/A CLUB RISQUE ON THE DELAWARE; GAIL BAKER; SABRINA BARRAR,

*Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is a prohibition on "lewd" entertainment in establishments that serve alcohol unconstitutionally overbroad on its face?

## PARTIES TO THE PROCEEDING

The petitioner is Jeffrey B. Miller, in his official capacity as Commissioner of the Pennsylvania State Police. The respondents are Conchatta, Inc., t/d/b/a Club Risque on the Delaware, and two club dancers, Gail Baker and Sabrina Barrar.

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## OPINIONS BELOW

The decision of the Court of Appeals is reported at 458 F.3d 258 and is reprinted at Pet. App. 1a-22a. The decision of the District Court is not reported, but is reprinted at Pet. App. 25a-31a.

An earlier decision by the Court of Appeals is reported at 83 Fed.Appx. 437 and is reprinted at Pet. App. 32a-59a. The decision of the District Court giving rise to that first appeal also is not reported, but is reprinted at Pet. App. 60a-68a.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 2006. A petition for rehearing was timely filed and was denied on September 15, 2006. Pet. App. 23a-24a. This petition is being filed within ninety days thereafter. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution provides in relevant part that "Congress shall make no law ... abridging the freedom of speech ...." U.S. CONST., amend. I.

2. The Pennsylvania Liquor Code provides in relevant part:

> It shall be unlawful ... for any licensee ... to permit in any licensed premises or in any place operated in connection therewith any lewd ... entertainment....

Pa. Stat. Ann., tit. 47, § 4-493(10) (Purdon 2006-2007 Supp.)

3. Regulations adopted by the Pennsylvania Liquor Control Board provide in relevant part:

> A licensee may not permit an employee, servant, agent, event/tournament/contest participant or a person engaged directly or indirectly as an entertainer in the licensed establishment or a room or place connected therewith, to be in contact or associate with the patrons in the establishment, room or place for a lewd ... or unlawful purpose.

40 Pa. Code § 5.32(b) (2006).

## STATEMENT OF THE CASE

Pennsylvania prohibits establishments that serve alcohol from presenting "lewd" entertainment, and the Court of Appeals held that this prohibition is unconstitutionally overbroad on its face. The Court of Appeals reasoned that the prohibition "punish[es] a significant amount of protected speech in relation to [its] legitimate scope," Pet. App. 3a, because "lewd" entertainment is forbidden not only at topless bars, but also at "theater and ballet performances, concerts, and other similar forms of entertainment" if alcohol is served. Pet. App. 20a. The Court should review this decision because the permissible scope of state regulation of "adult" entertainment is an important and recurring issue on which, as the lower courts have frequently noted, the law has become confusing and fractured – particularly when the regulation of entertainment is undertaken in the context of alcohol regulation. Furthermore, the Court of Appeals' decision is unsupportable on any reading of the law.

1. Pennsylvania, like most States, tightly regulates the retail sale of alcoholic beverages, and governs every aspect of liquor sales in the Commonwealth, through the Pennsylvania Liquor Code. *See* Pa. Stat. Ann., tit. 47, § 1-101 *et seq.* (Purdon 1997 & 2006 Supp.). The Liquor Code is an exercise of the police power to protect the "public welfare, health, peace and morals of the people of the Commonwealth." *Id.*, § 1-104. Under its provisions, alcohol may be sold for on-premises consumption only in establishments licensed for that purpose by the Commonwealth's Liquor Control Board. *See id.*, §§ 4-401 through 4-414, 4-491(a).[1] At the time of the district court proceedings, there were between 15,000 and 18,000 such licensed establishments in the Commonwealth, most classified as "restaurants"[2] under the Liquor Code. Pet. App. 14a-15a. Licenses may also be obtained by "performing arts facilities," "public venues," and other types of establishments.[3]

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[1] Carry-out sales, which are not involved in this case, are likewise tightly controlled. Wine and distilled spirits are sold primarily through the network of retail stores operated by the Liquor Control Board itself. *See id.*, §§ 3-301, 3-305. Malt and brewed beverages are sold primarily through licensed distributors, *see id*, §§ 4-431 through 4-447; holders of restaurant and similar licenses may also sell small quantities of such beverages for off-premises consumption. *See id.*, § 4-407.

[2] The Liquor Code defines a "restaurant" as a place "habitually and principally used for the purpose of providing food for the public, ... equipped with tables and chairs ... accommodating at least thirty persons at one time." *Id.*, § 1-102.

[3] A "performing arts facility" is a large-capacity hall or theater in which "live musical[s], concert[s], dance, ballet and legitimate play[s]" (but not burlesque) are presented. A "public venue" is a "stadium, arena, convention center" or the like. *See id.*, §§ 1-102, 4-412, 4-413. Other categories of licensed establishments include hotels, clubs, "eating places" (continued...)

The Liquor Code comprehensively regulates the operations of these licensees. Petitioner, as head of the Pennsylvania State Police, oversees its Bureau of Liquor Control Enforcement, which is statutorily charged with enforcing the Liquor Code. *Id.*, § 4-211(a). Although the Liquor Code does provide for the imposition of criminal penalties upon licensees who violate its provisions, *see id.*, § 4-494, in practice these provisions are enforced solely through a civil regulatory process in which violations are punishable by fines, or by the suspension or revocation of licenses; and in which initial decisions by administrative law judges are appealable to the Pennsylvania court system. *Id.*, § 4-471; Pet. App. 5a.

Among the many provisions of the Liquor Code governing licensees is Section 4-493(10), the provision respondents challenged in this case. Section 4-493(10) prohibits licensees from permitting "any lewd ... entertainment" in the licensed premises or in any place "operated in connection therewith." A companion regulation adopted by the Liquor Control Board prohibits licensees from allowing employees or entertainers to be "in contact or associate with the patrons for a lewd ... purpose." 40 Pa. Code § 5.32(b).

The term "lewd" is not defined in the Liquor Code but, as the District Court held, it has "acquired a well-understood meaning" at common law generally and in Pennsylvania law specifically: a lewd act is "'an act of open indecency which tends to corrupt the morals of the community.' ... The prohibited conduct amounts to gross flouting of community standards in respect to sexuality or nudity in public.'" *Comm. v. Heinbaugh*, 354 A.2d 244, 247 (Pa. 1976), *quoted in part* at Pet.

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(which unlike "restaurants" serve only malt and brewed beverages), and transportation facilities such as railroad cars and airplanes. *See id.*, §§ 1-102, 4-403, 4-432, 4-408.

App. 27a. The actual application of Section 4-493(10)'s ban on "lewd" conduct confirms this understanding of the term. The district court record contains a comprehensive sample of administrative decisions interpreting and applying Section 4-493(10) and the companion regulation. It is apparent from those decisions and from reported court cases[4] that "lewd" conduct has not been found, or even alleged, anywhere but in the "adult" entertainment context, and even then only in cases involving totally nude dancing, exposure of the genitals, or physical sexual contact between patrons and dancers.[5] Pet. App. 12a.

No enforcement action alleging "lewd" conduct has ever been brought against a licensee who presented a "play[], musical[], concert[], political satire[], ...ballet[], ...poetry reading[]," or anything else that could remotely be thought to fall within what the Court of Appeals called "mainstream" entertainment.[6] *See* Pet. App. 15a-

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[4] *E.g., Rising Sun Entertainment, Inc. v. Pa. Bureau of Liquor Control Enforcement*, 829 A.2d 1214 (Pa. Cmwlth. 2003); *Commonwealth v. CIC Investors No. 870 Ltd.*, 584 A.2d 1094 (Pa. Cmwlth. 1990); *Commonwealth v. Ronnie's Lounge, Inc.*, 383 A.2d 544 (Pa. Cmwlth. 1978).

[5] *See*, for example, the adjudication in *Pa. State Police, Bureau of Liquor Control Enforcement v. 98 N. 5th Darby Inc.*, No. 99-1396 (Nov. 22, 2000) (entertainment included live dancers who were totally nude, and who engaged in oral sex and other sexual conduct with patrons, plus hard-core pornographic movie depicting vaginal, oral and anal intercourse). This decision, and others dealing with Section 4-493(10), are available on the Liquor Control Board's website, http://www.lcb.state.pa.us/webapp/Legal/PublicAdjudicationsSrch.asp (visited December 7, 2006).

[6] A search for the word "lewd" on the web page identified in the preceding footnote turns up about 230 decisions dating from 1996 to the present. Suffice it to say that none of them involves a poetry reading.

16a & n.4. This is not the result of mere forbearance by the petitioner: There is no evidence that "lewd" entertainment in fact takes place at such events; or that licensees which present, say, poetry readings, wish to do so in a manner involving acts of "public indecency" that would "corrupt the morals of the community" but are constrained by fear of the operation of Section 4-493(10). Nor, "lewdness" aside, is there any evidence of how frequently "mainstream" entertainment is presented on licensed premises or, to the extent it is, how often it involves any nudity.

Respondent Conchatta Inc. operates an establishment known as "Club Risque on the Delaware," Pet. App. 3a, licensed as a restaurant by the Liquor Control Board. Pet. App. 60a.[7] Respondents Baker and Barrar are dancers who perform at Club Risque. They do erotic strip-teases, taking off their clothes piece by piece, until all that remains are their G-Strings, nipple coverings ("pasties"), and high-heeled shoes. They then circulate among the patrons of Club Risque, seeking tips.[8] Pet. App. 3a, 34a. Both testified that they would like to perform without covering their nipples, Pet. App. 66a, but – adhering to their employer's rules, *see* Pet. App. 53a – they do not totally bare themselves. Pet. App. 66a. Respondents have never been cited for violating Section 4-493(10) or the related regulation, nor has any enforcement action against them been threatened. Pet. App. 44a-45a, 66a.

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[7] Although respondents have described Club Risque as a "gentleman's club," *see* Pet. App. 34a, 60a, it is classified as a "restaurant" rather than a "club" under the Liquor Code. *See id.*, § 1-102 (defining "club").

[8] Club Risque also has separate rooms where dancers perform private dances for a fee. Pet. App. 34a. Throughout the club, physical sexual contact between dancers and patrons is specifically prohibited. *Id.*

2. Respondents brought this action in the District Court pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the enforcement of both Section 4-493(10) and its companion regulation, which they asserted were vague and overbroad on their face, and unconstitutional under the First Amendment as applied.[9] The District Court denied respondents' request for a preliminary injunction because they had not demonstrated any likelihood of irreparable harm, *see* Pet. App. 60a-68a, and in an interlocutory appeal the Court of Appeals affirmed on the same ground. *See* Pet. App. 32a-59a.

In the meantime, the Pennsylvania Supreme Court had rendered a decision in *Purple Orchid, Inc. v. Pennsylvania State Police*, 813 A.2d 801 (Pa. 2002). In *Purple Orchid*, the Pennsylvania Supreme Court rejected a First Amendment challenge to Section 4-493(10), finding that it was a content-neutral regulation of expressive conduct, valid under the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). The court did not, however, address either vagueness or overbreadth. *Purple Orchid*, 813 A.2d at 804-805.

On the parties' cross-motions for summary judgment, the District Court adopted the reasoning of the *Purple Orchid* decision, and held that under *O'Brien* the challenged statutory provision was a constitutional regulation of conduct. Pet. App. 29a. Turning to respondents' vagueness claim, the District Court held that "the term 'lewd' has, over time, acquired a well-understood meaning." Pet. App. 27a. The District Court

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[9] Respondents also challenged Section 4-493(10)'s prohibition on "immoral" or "improper" entertainment. The District Court later held that both terms were unconstitutionally vague and enjoined their enforcement. *See* Pet. App. 27a, 29a. Petitioner did not appeal this aspect of the decision, which is not before the Court.

noted that this Court had held that the word "lewd" was "well understood through long use and [was] sufficiently clear so as not to constitute unconstitutional vagueness." Pet. App. 28a, *citing Osborne v. Ohio*, 495 U.S. 113, 114 (1990), and *Winters v. New York*, 337 U.S. 507, 518 (1948).[10] In the District Court's view, then, respondents were "adequately apprised of what they may or may not do in order to avoid 'lewd' performances or activities." Pet. App. 28a. The District Court therefore granted summary judgment to petitioner with respect to the validity of the ban on "lewd" entertainment or conduct, without specifically addressing respondents' overbreadth challenge. *Id.*[11]

3. Respondents appealed. The Court of Appeals found it unnecessary to resolve respondents' vagueness or as-applied challenges, Pet. App. 22a; rather, the

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[10] In *Winters*, the Court said that the word "lewd" is "well understood through long use in the criminal law." 337 U.S. at 518. Comparable to "lascivious," it has been described as "a commonsensical term whose constitutionality was specifically upheld in *Miller v. California* [413 U.S. 15 (1973), and *New York v. Ferber*, 458 U.S. 747 (1982)]." *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1288 (9th Cir. 1992), *aff'd*, 513 U.S. 64, 78-79 (1994). A "lewd" act or statement is "vulgar," "indecent," or "salacious." *State v. Richards*, 127 Idaho 31, 38, 896 P.2d 357, 364 (Idaho App. 1995). *See also Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986) (student could be disciplined for "lewd speech" that was graphic, sexually explicit, laced with innuendo, vulgar, and offensive); *Black's Law Dictionary* 907 (6th Ed. 1990) ("lewd" synonymous with "lustful, indecent, lascivious, lecherous").

[11] As noted, *see supra* at 7 n. 9, the District Court did enjoin enforcement of the statute insofar as it prohibited entertainment which was "immoral" or "improper," and petitioner did not appeal that decision.

Court of Appeals focused solely on respondents' overbreadth claim.

The Court of Appeals began its overbreadth analysis, not with a discussion of the meaning of the term "lewd," but with a search for the "availability of a limiting construction." Pet. App. 8a. As discussed above, the District Court had held that the term "lewd" had acquired a "well-understood meaning" in Pennsylvania law: "a lewd act is 'an act of open indecency which tends to corrupt the morals of the community.'" Pet. App. 27a-28a, *quoting Comm. v. Heinbaugh*, 354 A.2d 244, 247 (Pa. 1976). While the Court of Appeals did assume that the term "lewd" is not unconstitutionally vague, Pet. App. 9a n. 2, this "well-understood meaning" played no role in the Court of Appeals' analysis. At no point did the Court of Appeals address the common law authorities identified by the District Court.[12] Rather, the Court of Appeals sought its "limiting construction" solely in decisions explicitly construing the term "lewd" *in the Liquor Code*.

The Court of Appeals acknowledged that the challenged provisions have been applied exclusively to erotic dancing involving exposure of dancers' breasts and genitals and physieal sexual contact between patrons and dancers. Pet. App. 12a. However, the court discounted this "past practice." Pet. App. 12a-13a. Without discussing the nature of the *conduct* prohibited by the challenged provisions, and invariably involved in past enforcement actions, the court said that, in the future, petitioner might "decide to target a broader range of *establishments*." Pet. App. 13a (emphasis

[12] When the Court of Appeals later remarked that it found it "difficult ... to answer" the question of what expression falls within the prohibition on "lewd entertainment," Pet. App. 16a, it again did so without discussing or even mentioning the wealth of case law on the meaning of "lewd."

added). On this basis, the Court of Appeals concluded that "no narrowing construction is available."[13]

The Court of Appeals then turned to the scope of the challenged statutory provision and regulation "based on their plain terms." Pet. App. 14a. The court began with the premise that the law and regulation apply "in a notably broad array of *contexts*," those being the 15,000 to 18,000 Pennsylvania establishments then holding liquor licenses. Pet. App. 14a-15a (emphasis added). While again acknowledging that actual enforcement actions have targeted "entertainment involving fully exposed breasts, genital exposure, or genital touching," Pet. App. 16a, in the context of "adult" entertainment, the Court of Appeals declined to confine the term "lewd" to this context. Rather, the Court of Appeals proceeded on the assumption that the challenged provisions prohibit licensees from offering *any* entertainment "involving nudity or genital touching." Pet. App. 17a.

At the beginning of its analysis, the Court of Appeals had invoked this Court's overbreadth decisions in *Virginia v. Hicks*, 539 U.S. 113 (2003), and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), for the proposition that a facial overbreadth challenge can succeed only on a "showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." Pet. App. 8a, *quoting Hicks*,

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[13] The Court of Appeals did not explain what "narrowing construction" it would have found acceptable. It cited to its own, then-recent decision in *181 South, Inc. v. Fischer*, 454 F.3d 228 (3d Cir. 2006), in which it upheld a similar New Jersey prohibition on the basis of a state-court construction which defined "lewd activities" as those where "the predominant object and natural effect ... is erotic excitation." Pet. App. 11a-12a. The Court of Appeals did not explain in what respect this definition of "lewd" was "narrower" than the common-law definition used in Pennsylvania.

539 U.S. at 118-119 (internal quotation marks omitted). Now, however, the Court of Appeals went off in a different direction, based on *United States v. O'Brien*, 391 U.S. 367 (1968). *O'Brien* (which was not an overbreadth case) calls for "intermediate scrutiny" and prescribes a four-part test under which First Amendment challenges to content-neutral laws that affect expressive conduct are judged. The Court of Appeals proceeded to apply *O'Brien's* four-part test to the challenged provisions as the Court of Appeals had just construed them, that is, on the assumption that the challenged provisions forbid *all* entertainment involving nudity or genital touching.

The Court of Appeals had "no question" that the ban on lewd entertainment and conduct meets the first three prongs of the *O'Brien* test.[14] These prohibitions, the court conceded, are content-neutral provisions "enacted to limit the secondary effects resulting from the combination of 'lewd' entertainment and consumption of alcohol." Pet. App. 19a. The court concluded, however, that the statute and regulation "are substantially overbroad under the fourth *O'Brien* requirement because Pennsylvania's asserted government interest is not applicable to a large number of affected *establishments*," and because the challenged provisions "could have been drafted more narrowly to specifically target secondary effects associated with nude or topless dancing." Pet. App. 19a (emphasis added). Reverting again now to *Broadrick* and *Hicks*, the Court of Appeals concluded that the challenged

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[14] That is, that the challenged provision is within the constitutional power of the government; that it furthers a substantial governmental interest; and that the governmental interest furthered is unrelated to the suppression of free expression. The fourth prong is that the restriction on First Amendment freedoms be no greater than is essential to the furtherance of that interest. Pet. App. 19a, *quoting O'Brien*.

provisions therefore "punish a substantial amount of protected free speech, judged in relation to their plainly legitimate sweep, and that they are therefore unconstitutionally overbroad." Pet. App. 21a-22a.

The Court of Appeals did not identify any licensee that actually presents, or seeks to present, "ordinary theater or ballet performances, concerts, or similar forms of entertainment," Pet. App. 20a, featuring nudity or genital touching. The Court of Appeals did not provide any support for its assertion that the number of such licensees, or the amount of protected speech involved, is "substantial," either in absolute terms or as a proportion of the total conduct regulated. Still less did the Court of Appeals attempt to make such a demonstration with respect to conduct that could be considered "lewd" under Pennsylvania case law or administrative practice.

In light of its holding on overbreadth, the Court of Appeals found it unnecessary to consider respondents' vagueness and as-applied challenges. Pet. App. 22a.

4. The Court of Appeals denied petitioner's request for panel rehearing and rehearing *en banc*. Pet. App. 23a-24a.

## REASONS FOR GRANTING THE WRIT

The Court's First Amendment jurisprudence has some "rough edges." Consequently, and notwithstanding the ultimate result in any individual case, the courts of appeals have had difficulty adjudicating challenges to laws that allegedly violate the First Amendment rights of those who provide adult entertainment, both in establishments licensed to sell alcohol and elsewhere. This case affords the Court an opportunity to provide much needed clarification. Moreover, even under a relatively straightforward

application of this court's existing precedents, the Third Circuit's overbreadth ruling in this case was grossly flawed and cannot stand.

## I. The Lower Courts Need Guidance On The Proper Approach To First Amendment Cases Involving The Regulation Of Adult Entertainment.

### A. The proper scope of the regulation of adult entertainment, particularly in combination with alcohol, is an important and recurring issue.

First Amendment challenges to content-neutral laws that incidentally affect expressive conduct – with and without an alcohol component – have arisen frequently and will continue to do so. Pennsylvania's prohibition on lewd entertainment in liquor-licensed establishments is not unique; a number of other States' liquor laws have identical or comparable language.[15] In

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[15] *See* Ala. Admin. Code § 20-x-6-.11(1) (no licensee shall permit "bottomless dancing or such performing, or any other lewd or indecent conduct..."); Ark. Code Ann. § 3-5-307(6) (beer licensee shall not permit "lewd, immoral, or improper entertainment..."); *Id.*, at § 3-9-306(4) (same for holders of license to sell wine for consumption with food on premises); 26 La. Rev. Stat. Ann. § 90(A)(13) (holder of permit for retail sale of alcoholic beverages shall not permit "any lewd, immoral, or improper entertainment..."); *Id.*, at § 286(A)(13) (same for dealers in beverages of low alcoholic content); Miss. Code Ann. § 67-3-53(c) (unlawful for holder of permit to sell beer or light wine to permit any "lewd, immoral or improper entertainment..."); Mo. Rev. Stat. § 311.710.1(3) (liquor licensee cannot permit "lewd, immoral or improper entertainment..."); *Id.*, at § 312.380.1(3) (same for non-intoxicating beer licensee) S.C. Code Ann. § 61-4-580(4) (holder of permit authorizing sale of beer or wine may not knowingly "permit lewd, immoral, or improper entertainment..."); Utah Code Ann. § 32A-5-107(8)(g)(vi) (continued...)

fact, the Court of Appeals considered and upheld a New Jersey liquor regulation prohibiting "lewdness" in licensed premises just a few weeks before its decision in this case. *See 181 South, Inc. v. Fischer*, 454 F.3d 228 (3d Cir. 2006).

While the Court has addressed the regulation of nudity, nude dancing and adult entertainment on several occasions, the lower courts (as discussed below) are not sure how to apply these decisions to new cases. Nor, as discussed in Point II below, is it clear how the Court's decisions on nudity and adult entertainment mesh with the Court's facial overbreadth jurisprudence when, as in this case, a First Amendment adult entertainment-related lawsuit includes an overbreadth claim. The Court should review this case to provide the necessary guidance.

**B. The lower courts are unsure of the correct standard to apply in cases such as this.**

1. It has been over thirty years since the Court gave plenary consideration to the validity, under the First Amendment, of laws regulating the type of entertainment that may be presented in liquor-licensed establishments. In *California v. LaRue*, 409 U.S. 109 (1972), the Court upheld state liquor regulations prohibiting various forms of actual or simulated sexual activity, fondling, and displays of genitalia. Observing that California's regulations only prohibited "'performances' that partake more of gross sexuality than of communication," the Court deemed it "critical," for First Amendment purposes, that these performances

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(private club license can be suspended or revoked on finding of "lewd entertainment" ); W. Va. Code Ann. § 11-16-18(a)(7) (unlawful for non-intoxicating beer licensee to permit "lewd, immoral or improper entertainment..."); *Id.*, at § 60-7-12 (same for liquor licensee).

were not forbidden "across the board" but only in "establishments [licensed] to sell liquor by the drink." *Id.*, at 118. Furthermore, the Court recognized that "the sort of bacchanalian revelries" proscribed under the regulations were not "the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater." *Id.* Given that "the scope of permissible state regulations significantly increases" when "the mode of expression moves from the printed page to the commission of [certain] public acts," *id.*, at 117, the state's restrictions were found constitutional on their face. *Id.*, at 118-19. Largely on the strength of *LaRue*, the Court summarily upheld a state statute prohibiting topless dancing in liquor-licensed premises in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (*per curiam*), and a similar city ordinance in *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92 (1986) (*per curiam*).

In the wake of *LaRue*, *Bellanca*, and *Iacobucci*, the overall constitutional validity of laws curtailing sexually-oriented entertainment in establishments serving alcohol appeared settled. However, subsequent developments in this Court and the courts of appeals have blurred rather than clarified the legal picture.

In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996), a liquor advertising case, the Court disavowed the reasoning of *LaRue* insofar as that decision had relied upon the Twenty-First Amendment. At the same time, the Court stressed that it was "persuaded that the ... analysis in *LaRue* would have led to precisely the same result," even if the Twenty-First Amendment had never been mentioned. *44 Liquormart*, 517 U.S. at 515. Despite this explicit reassurance of *LaRue*'s continued vitality, the courts of appeals have been hesitant to embrace *LaRue*, at least not without qualification. *See 181 South Inc. v. Fischer*, 454 F.3d 22[illegible] 232-33 (3d Cir. 2006) (summarizing several circuits' approaches to First Amendment cases

involving adult entertainment in establishments selling liquor, after *44 Liquormart*). *See also* Pet. App. 18a-19a.

2. Meanwhile, the Court has considered First Amendment challenges to measures that had nothing to do with alcohol but which arguably curtailed artistic expression in the adult entertainment sphere. Operators of establishments that featured nude erotic dancing challenged public indecency laws in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). In both cases, their challenges were rejected. In a related vein, theater owners and adult businesses sought to invalidate zoning ordinances in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). Those challenges, too, were unsuccessful.

In *Barnes* and in *Pap's A.M.*, the Court utilized the analytical framework of *United States v. O'Brien*, 391 U.S. 367 (1968), under which a content-neutral law that impinges upon expressive conduct is subjected to "intermediate scrutiny." The Court adopted an analogous approach in *Renton*, and employed it in *Alameda Books* as well. *See Alameda Books*, 535 U.S. at 440 ("*Renton* requires that municipal ordinances receive only intermediate scrutiny if they are content neutral"); *id.*, at 447 (Kennedy, J., concurring); *id.*, at 454 (Souter, J., dissenting). The problem is that, in three of these four rulings, the Court did not speak with one voice. Only in *Renton*, the earliest, did the Court issue an opinion that was joined in its entirety by a majority of the justices. *Barnes, Pap's A.M., and Alameda Books* were plurality decisions with multiple separate opinions.

Given the sheer number of different opinions emanating from the Court in this subject area, there is uncertainty among the courts of appeals over how best to synthesize, harmonize, and apply them. *E.g., Ben's*

*Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 707-722 (7th Cir. 2003) (court analyzed caselaw in depth, then formulated its own criteria for adjudication of adult-entertainment-related First Amendment claim). *See also Andy's Restaurant & Lounge, Inc. v. City of Gary*, 466 F.3d 550, 553 (7th Cir. 2006) ("There is some confusion about which line of cases should be used ...."); *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1184-85 (10th Cir. 2003) (there are "fractured decisions with no majority opinion and no clear statement of controlling doctrine"); *Peek-a-Boo Lounge of Bradenton v. Manatee County*, 337 F.3d 1251, 1255 (11th Cir. 2003) (extensive discussion of caselaw needed because Court has rendered "no-clear-majority decisions," sometimes "collapsed" two categories of cases into one, and "occasionally borrowed specific doctrines developed in one category of case to apply to the other"); *LLEH, Inc. v. Wichita County, Texas*, 289 F.3d 358, 365 (5th Cir. 2002) (clear that non-obscene nude dancing is protected – marginally – by First Amendment, and that government can regulate it, but test for reviewing such regulations "is not as clear"); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 133 (6th Cir. 1994) ("divining" which of varied standards is the law is "vexing task").[16]

3. To add to the confusion, this case involves still another strand of First Amendment case law, governing challenges which assert facial overbreadth. Here, the seminal decision is *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); since *Broadrick*, the Court has employed its analytical framework in a number of subsequent facial

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[16] *Ben's Bar* concerned an ordinance that restricted sale, use, and consumption of alcohol on premises of "Sexually Oriented Businesses." *Andy's Restaurant, Heideman, Peek-a-Boo Lounge, LLEH,* and *Triplett* did not specifically involve alcohol or its secondary effects.

overbreadth cases.[17] To petitioner's knowledge, however, no facial overbreadth claim has come before the Court in a case involving adult entertainment or liquor regulation. As discussed in the next section, the Court of Appeals' confused application of *Broadrick* to this case exemplifies the need for the Court to clarify this area.

## II. On Several Levels, The Court of Appeals' Approach To Respondents' Facial Overbreadth Claim Conflicts With That Of Other Circuits And With That Of The Pennsylvania Supreme Court.

If a law punishes a "substantial" amount of protected speech, judged in relation to its "plainly legitimate sweep," it may be facially overbroad. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). But invalidating a law as overbroad is "strong medicine." *Id.*, at 613. Indeed, overbreadth findings are to be rendered "sparingly and only as a last resort." *Id.* "Rarely, if ever" will an overbreadth challenge succeed against a content neutral law that only indirectly affects protected speech. *See Virginia v. Hicks*, 539 U.S. 113, 124 (2003). A facial overbreadth determination is not warranted "when a limiting construction has been or could be placed on the challenged statute." *Broadrick*, 413 U.S. at 613.

In three distinct ways, the Court of Appeals' approach to the facial overbreadth issue in this case is at odds with the approach of other circuits, and it

[17] *Virginia v. Hicks*, 539 U.S. 113 (2003), is one of the most recent examples. *See also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14-15 (1988); *New York v. Ferber*, 458 U.S. 747, 766-74 (1982); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215-17 (1975).

directly conflicts with a decision of the Pennsylvania Supreme Court.

### A. The lower courts have taken varying approaches to the relationship between the *Broadrick* and *O'Brien* lines of cases.

Analyzing a facial overbreadth claim in accordance with *Broadrick* and its progeny, and subjecting a law to *O'Brien* "intermediate scrutiny" in connection with a more general First Amendment challenge, are independent inquiries. One does not subsume the other; nor is resolution of one necessarily contingent on resolution of the other. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 317 n.6 (2000) (Souter, J., concurring in part) (deciding facial overbreadth challenge would be "simpler route[] to disposition" because it "would obviate the need for the factual development that is a prerequisite to *O'Brien* analysis"). Opinions of the Fifth,[18] Seventh,[19] Eighth,[20] and Ninth[21] circuits in

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[18] *Baby Dolls Topless Saloons, Inc. v. City of Dallas, Texas*, 295 F.3d 471, 480-82 (5th Cir. 2002) (*Renton* analysis of content-neutral ordinance); *id.*, at 482-83 (separate *Broadrick* overbreadth analysis); *J&B Entertainment, Inc. v. City of Jackson, Mississippi*, 152 F.3d 362, 367-68 (5th Cir. 1998) (self-contained overbreadth analysis; no reference to "intermediate scrutiny"); *id.*, at 369-78 (*O'Brien* analysis).

[19] *Schultz v. City of Cumberland*, 228 F.3d 831, 839-48 (7th Cir. 2000) (general First Amendment analysis); *id.*, at 848-51 (separate overbreadth analysis, without reference to "scrutiny" level or *O'Brien* criteria).

[20] *SOB, Inc. v. County of Benton*, 317 F.3d 856, 859-64 (8th Cir. 2003) (detailed analysis of content-neutral ordinance under *O'Brien* etc.); *id.*, at 864-65 (separate, self-contained overbreadth discussion); *Ways v. City of Lincoln, Nebraska*, 274 F.3d 514, 518-20 (8th Cir. 2001) (court only addresses overbreadth claim; *O'Brien* criteria not incorporated into analysis); *Farkas v. Miller*, 151 F.3d 900, 902-905 (8th Cir. 1998) (regulation upheld under *O'Brien* (continued...)

adult-entertainment-related cases entailing facial overbreadth claims reflect this distinction.[22] The Third Circuit in this case, however, imported the four-part *O'Brien* test into its overbreadth analysis,[23] and the

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test); *id.*, at 905 (separate consideration of overbreadth, without reference to scrutiny level, *O'Brien*, etc.).

[21] *Gammoh v. City of LaHabra*, 395 F.3d 1114, 1121-22 (9th Cir. 2005) (self-contained overbreadth discussion; no reference to *O'Brien*, etc.); *id.*, at 1122-28 (separate free expression/secondary effects analysis, employing intermediate scrutiny).

[22] In this regard, the opinions of the Sixth Circuit are difficult to parse. *See Odle v. Decatur County, Tennessee*, 421 F.3d 386, 392-400 (6th Cir. 2005) (applicability of intermediate scrutiny mentioned in passing, but decision overall deals with overbreadth); *Déjà vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson County*, 274 F.3d 377, 387-89 (6th Cir. 2001) (analyzing overbreadth of certain provisions of ordinance without reference to "scrutiny" level); *id.*, at 391-96 (First Amendment validity of other provisions judged according to *O'Brien* test); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) (lengthy discussion pursuant to intermediate scrutiny caselaw, followed by brief, separate facial overbreadth finding).

[23] As more fully spelled out in petitioner's Statement of the Case above, in this case, the Court of Appeals relied on its not-yet-complete overbreadth findings to support its conclusion that not all *O'Brien* requirements were met (*see* Pet. App. 19a), then held, on that basis, that Section 4-493(10) was indeed substantially overbroad (*see* Pet. App. 21a-22a). In *181 South Inc. v. Fischer*, 454 F.3d 228 (3d Cir. 2006), by contrast, the same court first resolved the liquor license holder's general First Amendment challenge to New Jersey's ban on "lewdness," *id.*, at 231-34, then – separately – considered the licensee's facial overbreadth challenge, *id.*, at 234-35.

Fourth Circuit has taken a similarly confusing and illogical route.[24]

### B. The Court of Appeals' refusal to accept administrative practice as relevant to the scope of an allegedly overbroad provision conflicts with the decisions of other circuits.

The Third Circuit's approach to respondents' facial overbreadth claim diverged from that of other circuits in another way. The Court of Appeals refused to accept administrative practice (both historical and anticipated) as limiting the scope of the challenged provisions for overbreadth purposes; indeed, the Court of Appeals found this to be of "no relevance" at all. *See* Pet. App. 12a-14a. The Court of Appeals recognized, but declined to follow, a contrary decision from the Eighth Circuit. *See* Pet. App. 13a, *citing SOB, Inc. v. County of Benton*, 317 F.3d 856, 865 (8th Cir. 2001) (rejecting overbreadth challenge where evidence showed that the prosecutor did not intend to enforce the challenged ordinance against theatrical productions with serious artistic merit).[25] The Fifth Circuit took the same

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[24] *See Giovani Carandola Ltd. v. Bason*, 303 F.3d 507, 512-20 (4th Cir. 2002). In that opinion, the court affirmed the entry of a preliminary injunction. A second appeal in the same litigation is currently pending. *See Carandola v. Fox*, *appeal docketed*, No. 05-2308, 06-1040 (4th Cir. Nov. 28, 2005).

[25] Instead, the Third Circuit relied on *Odle v. Decatur County, Tennessee*, 421 F.3d 386, 397 (6th Cir. 2005), and *Ways v. City of Lincoln, Nebraska*, 274 F.3d 514 (8th Cir. 2001). *Ways* is entirely inapposite, due to its unique facts and procedural posture. To the extent that *Odle* is consistent with the Third Circuit's approach in this case, it serves to highlight the split, on this point, between the Third (and Sixth) Circuits on one hand and the Fifth and Eighth Circuits on the other.

approach as the Eighth in *Baby Dolls Topless Saloons, Inc. v. City of Dallas, Texas*, 295 F.3d 471, 483 (5th Cir. 2002) (rejecting overbreadth challenge, relying on "an established history of not classifying mainstream businesses as [sexually oriented businesses]").

### C. The Court of Appeals held that the challenged provisions do not satisfy the *O'Brien* test, and the Supreme Court of Pennsylvania has held that they do.

Finally, as noted above, a *Broadrick* overbreadth claim and an *O'Brien* case are two different things, and the Court of Appeals should not have incorporated the four-part *O'Brien* test into its facial overbreadth analysis. If, however, *O'Brien* does have a role to play in determining whether a law is facially overbroad then, the Court of Appeals' decision directly conflicts with that of Pennsylvania's highest court. *See Purple Orchid, Inc. v. Pennsylvania State Police*, 813 A.2d 801 (Pa. 2002). In *Purple Orchid*, the Pennsylvania Supreme Court applied the *O'Brien* test, concluded that Section 4-493(10) satisfies all four prongs of that test, and held that Section 4-493(10) was not violative of the appellant's First Amendment right to freedom of expression. *Id.*, 813 A.2d at 812-13. The Court of Appeals' decision cannot be reconciled with this holding.

The Court of Appeals' decision thus graphically illustrates the disarray among the lower courts and the need for clarification from this Court. The Court should review this case to provide that clarification.

## III. The Court of Appeals' Analysis Is Wrong Under Both *Broadrick* And *O'Brien*.

In finding Section 4-493(10) overbroad, the Court of Appeals made major mistakes that that cannot be justified logically or under settled caselaw. Even ignoring the jurisprudential problems that cast a long

shadow over this entire case (as discussed in Points I and II above), the Court of Appeals' decision does not withstand scrutiny.

First, the court lacked a legitimate basis for finding that no limiting construction was available to save Section 4-493(10) (and the companion regulation) from invalidation. The court's conclusion rested on the premise that decades of liquor enforcement activity in Pennsylvania, all aimed exclusively at nude dancing, genital exposure, and/or patron/entertainer contact in adult entertainment settings – as the court specifically acknowledged (Pet. App. 12a) – was irrelevant, because things might change in the future (Pet. App. 12a-14a). As a matter of law, this premise was simply wrong.

Contrary to the Court of Appeals' assumption, for purposes of overbreadth analysis, the existence of an appropriate limiting construction may indeed be based on evidence of how the challenged law has been interpreted and enforced in the past. *See Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989) ("Administrative interpretation and implementation of a regulation are, of course, highly relevant" to analysis of facial challenge to law); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988) (law's limits may be made explicit by "textual incorporation, binding judicial or administrative construction, or well-established practice"); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). *Cf. Garner v. Jones*, 529 U.S. 244, 256 (2000) (in context of *ex post facto* challenge, court should have considered Parole Board's internal policy statement, because "policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations..."); *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984) (judicial deference to federal agency construction of statutory scheme it administers).

If the Court of Appeals' approach, focusing on the abstract possibility of a change in direction in the future, were correct, it would *never* be possible to uphold an allegedly overbroad law on the basis of a limiting construction. It is always *possible* for enforcement priorities to change, for a law to be reinterpreted, or for an administrative or judicial precedent to be superseded. That alone cannot prevent application of the limiting construction principle.

Second, the Court of Appeals lost sight of the requirement that, "particularly where conduct and not merely speech is involved," overbreadth must be both "real" and "substantial." *Broadrick*, 413 U.S. at 615. The only type of expressive conduct prohibited by Section 4-493(10) is "lewd" entertainment, and the Court of Appeals accepted as given that that term is not vague (Pet. App. 9a). Just because, by definition, the law applies to all licensees, as it surely does, it does not follow that there is any likelihood, let alone a real or substantial likelihood, that any licensee offering mainstream entertainment will *ever* become ensnared in an enforcement proceeding based on the challenged provisions, initiated by overzealous Liquor Enforcement Officers. Indeed, to succeed on their facial overbreadth claim, respondents bore the burden of demonstrating "from actual fact" that a substantial number of instances exist in which Section 4-493(10) cannot be applied constitutionally. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988). The Court of Appeals, however, did not hold them to this requirement. Instead, the court allowed respondents to prevail solely on the basis of speculation and conjecture about what might happen some day, somewhere in a licensed establishment, without requiring the presentation of any "actual facts" at all.

Even assuming that there is a possibility, albeit remote, that Section 4-493(10) might be misapplied to a licensee offering avant garde (but non-lewd) entertainment, the law contemplates resolution of such aberrant situations on a case-by-case basis, through any available administrative hearing and judicial review process or through "as applied" litigation. *See Hicks*, 539 U.S. at 124 (where there are many legitimate applications of policy, those few that violate First Amendment "can still be remedied through as-applied litigation"); *Broadrick*, 413 U.S. at 618 (even if "some other improper applications" are possible, law need not "be discarded in toto because some persons' arguably protected conduct may or may not be caught or chilled by the statute"). *Accord New York State Club Ass'n*, 487 U.S. at 14; *New York v. Ferber*, 458 U.S. 747, 773-74 (1982). Striking down Section 4-493(10) (and 40 Pa. Code § 5.32(b)) as facially overbroad is not the solution to the hypothetical problem perceived by the Court of Appeals here.

In essence, the Court of Appeals disregarded *Broadrick*'s proportionality mandate in favor of the fourth prong of the *O'Brien* test, then compounded the problem by effectively transforming that *O'Brien* prong into a "least restrictive alternative" requirement – which it is not. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 301-302 (2000); *Ward v. Rock Against Racism*, 491 U.S. 781, 797-98 & n.6 (1989). To the extent that *Broadrick* and *O'Brien* can be deemed analogous or comparable to each other at all, both are deferential to legislative decisions, but the Court of Appeals failed to accept that reality.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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Date: December 14, 2006

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 05-1803

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CONCHATTA INC.,
t/d/b/a CLUB RISQUE ON THE DELAWARE;
GAIL BAKER; SABRINA BARRAR,

v.

*COL. JEFFREY B. MILLER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, PENNSYLVANIA STATE POLICE

Conchatta, Inc.; Gail Baker;
Sabrina Barrar,

Appellants

* (Amended pursuant to F.R.A.P. 43(c))
On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 01-cv-01207)
District Court Judge: Honorable John P. Fullam

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Argued April 25, 2006

Before: FUENTES, STAPLETON and ALARCON,[1]
Circuit Judges.

(Filed: August 15, 2006)

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[1] The Honorable Arthur L. Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

OPINION OF THE COURT

FUENTES, Circuit Judge.

The operator of a club in Philadelphia that features semi-nude dancing, as well as two of its dancers, challenge a Pennsylvania Liquor Code statute and regulation that prohibit "lewd" entertainment at any licensed establishment. Plaintiffs argue that the statute and regulation are unconstitutional both on their face and as applied to plaintiffs. We conclude that the statute and regulation are facially invalid because they are substantially overbroad, punishing a significant amount of protected speech in relation to their legitimate scope.

## I. BACKGROUND

Plaintiff Conchatta, Inc. operates Club Risque, a Philadelphia bar where erotic "striptease" performances are shown, and plaintiffs Gail Baker and Sabrina Barrar are dancers who have performed at Club Risque. During the performances, the dancers take off their clothes, leaving only G-strings, liquid latex covering their nipples, and high-heeled shoes. Club Risque prohibits physical contact between the dancers and patrons.

In March 2001, plaintiffs (hereinafter "Conchatta") filed suit in the United States District Court for the Eastern District of

Pennsylvania against the Commissioner of the Pennsylvania State Police (hereinafter "the Commissioner"),[1] seeking preliminary and permanent injunctive and declaratory relief as to the enforcement of 47 Pa. Cons. Stat. Ann. §4-493(10) (2005) (hereinafter "the Statute"), which provides that it shall be unlawful:

> for any licensee, under any circumstances, to permit in any licensed premises or in any place operated in connection therewith any lewd, immoral or improper entertainment . . .

Conchatta also sought relief as to one of the Statute's implementing regulations, 40 Pa. Code § 5.32(b) (2006) (hereinafter "the Regulation"), which provides in pertinent part:

> A licensee may not permit an employee, servant, agent, event/tournament/contest participant or a person engaged directly or indirectly as an entertainer in the licensed establishment or a room or place connected therewith, to be in contact or associate with the patrons in the

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[1] The Commissioner is an appropriate defendant here because enforcement of the relevant statutory provisions is entrusted to the Bureau of Liquor Control Enforcement, which is a division of the Pennsylvania State Police. See 47 Pa. Cons. Stat. Ann. § 2-211(2005). Defendant Col. Jeffrey B. Miller has replaced the original defendant in this case, Col. Paul J. Evanko, as the State Police Commissioner.

establishment, room or place for a lewd, immoral, improper or unlawful purpose.

Under Pennsylvania law, violation of the Statute is a misdemeanor that can result in a fine of up to five thousand dollars and imprisonment for a period of three months to one year, as well as to suspension or revocation of the liquor license. See 47 Pa. Cons. Stat. Ann. § 4-494(a), (b) (2005). Violation of the Regulation can also result in a fine and license suspension or revocation. The Commissioner asserts that there have been no criminal convictions under the challenged portions of the Statute and Regulation, and that they are enforced solely through a civil regulatory process.

In the District Court, Conchatta alleged that the Statute and Regulation (collectively, the "Challenged Provisions") are unconstitutional under the First Amendment because they are impermissibly overbroad and vague on their face. Conchatta also alleged that the Challenged Provisions are unconstitutional as applied to it. Following an evidentiary hearing, the District Court denied Conchatta's motion for a preliminary injunction in April 2001, concluding that Conchatta had demonstrated neither a likelihood of success on the merits nor that it would suffer irreparable harm without an injunction. The Court declined to address Conchatta's overbreadth and vagueness claims. In anticipation of a decision related to the Statute that was due to come down from the Supreme Court of Pennsylvania, the Court stayed further proceedings in the case and

closed the matter administratively, subject to a motion to reopen.

In May 2001, Conchatta appealed the District Court's denial of its motion for a injunction. This Court affirmed in a non-precedential per curiam opinion, with a dissent. Conchatta, Inc. v. Evanko, 83 Fed. App'x 437 (3d Cir. 2003). The majority found that Conchatta had made a strong case that the statute is overbroad," but had failed to demonstrate irreparable harm under the preliminary injunction standard. Id. at 441. In dissent, Judge Roth concluded that the Statute was overbroad and also found that the irreparable harm requirement had been satisfied. Id. at 444-46.

The Pennsylvania Supreme Court decision anticipated by the District Court, Purple Orchid, Inc. v. Pennsylvania State Police, 813 A.2d 801 (Pa. 2002), was issued in December 2002. There, the court held that the Statute was not unconstitutional under the First Amendment as applied to a bar featuring semi-nude dancing. Id. at 812-13. The Purple Orchid court explicitly declined, however, to consider whether the Statute was unconstitutionally overbroad or vague on its face. Id. at 804-05.

The District Court returned the case to active status, and Conchatta filed a motion for summary judgment in April 2004. The Commissioner then filed a cross-motion for summary judgment. In February 2005, the District Court held that the terms "immoral" and

"improper" in the Challenged Provisions were unconstitutionally vague, but that the term "lewd" was not. Conchatta, Inc. v. Evanko, No. 01-01207, 2005 WL 426452, *2 (E.D. Pa. Feb. 23, 2005). The Court therefore granted Conchatta' s summary judgment motion in part, ordering that the terms "immoral" and "improper" be excised from the Challenged Provisions, but denied the motion with respect to the remainder of the challenged language. Id. at *3 The Court did not address Conchatta's overbreadth claim.

Conchatta now appeals the denial in part of its motion for summary judgment, with respect to the non-excised portions of the Challenged Provisions. The Commissioner does not appeal the District Court's order that the terms "immoral" and "improper" be excised. We therefore consider the Challenged Provisions in their new form, with the single term "lewd" replacing the three terms "lewd," immoral," and "improper."

## II. DISCUSSION

### A. Overbreadth

"The showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate all enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected

expression.'" Virginia v. Hicks, 539 U.S. 113, 118-19 (2003) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613, 615 (1973)). A litigant may challenge a statute as substantially overbroad under this principle "even though the conduct of the [litigant] is clearly unprotected and could be proscribed by a law drawn with the requisite specificity." New York v. Ferber, 458 U.S. 747, 769 (1982). This broad standing rule is rooted in the view that a statute's "'very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" Peachlum v. City of York, Pennsylvania, 333 F.3d 429, 438 (3d Cir. 2003) (quoting Broadrick 413 U.S. at 612). Thus, in making their overbreadth claim, Conchatta may assert the rights of any liquor licensees subject to the Challenged Provisions.

The Supreme Court has noted, however, that "when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975) Broadrick, 413 U.S. at 613 (holding that the invalidation of an ordinance on overbreadth grounds is "strong medicine" to be used "sparingly and only as a last resort").

1. Availability of a Limiting Construction

In determining the scope of a state law challenged for overbreadth, this Court must consider any limiting construction that a state

court or enforcement agency has proffered."[2] Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982). A narrowing construction can save an otherwise unconstitutional statute by eliminating the statute's substantial overbreadth. See Hicks, 539 U.S. at 118-19. If a statute is "readily susceptible" to a limiting interpretation that would make it constitutional, the statute must be upheld, but "we will not rewrite a state law to conform it to constitutional requirements." Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988).

Although Pennsylvania courts and agencies have addressed the Statute—which has been in effect in Pennsylvania since the early 1950s—on numerous occasions, no clear narrowing construction of the Challenged Provisions has emerged. The Pennsylvania Supreme Court has twice considered the Statute's constitutionality. In In re Tahiti Bar, 150 A.2d 112 (Pa. 1959), the court rejected an as-applied First Amendment challenge to the Statute by a bar that featured erotic dancing, holding that Pennsylvania's authority to regulate liquor consumption gave it almost limitless power to regulate speech where liquor is consumed. Id. at 115-16. The court also concluded that, taken as a whole, the phrase "lewd, immoral, or improper" was not unconstitutionally vague. Id. at 118-19. Without specifically construing the

[2] For purposes of Conchatta's overbreadth claim, we assume that the terms of the Challenged Provisions are not unconstitutionally vague.

challenged terms, the court upheld the lower court's finding that the performance in plaintiffs' bar was "lewd or obscene as well as immoral under any definition of these terms." Id. at 119 (internal quotation marks omitted).

More recently, in Purple Orchid, the Pennsylvania Supreme Court disavowed its analysis in Tahiti Bar, noting that under recent United States Supreme Court precedent, a state does not have plenary authority over the regulation of expression in liquor licensee establishments. Purple Orchid, 813 A.2d at 806; see 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 515-16 (1996). The Purple Orchid court nonetheless upheld the Statute under the First Amendment as applied to a club featuring erotic dancing. 813 A.2d at 812-13. The court did not adopt a limiting construction of the Statute, stating only that the Statute "apparently has not been applied to prohibit erotic dancing outright in establishments licensed to serve alcohol. Instead, it has been interpreted by enforcement officials as requiring the dancers to cover themselves, at a minimum, with what are commonly known as 'pasties' and a 'G-string.'" Id. at 803.

In Pennsylvania Liquor Control Board v. J.P.W.G., Inc., 489 A.2d 992 (Pa. Commw. Ct. 1985), which involved a challenge to a fine imposed under the Statute on a bar featuring topless dancing, the Pennsylvania Commonwealth Court noted that "we have found no case law and none has been cited to us construing the terms lewd, immoral or improper

as used in the Code." Id. at 995 (emphasis omitted). Without limiting the scope of those terms, the court stated that "we are convinced that partial nudity of a female dancer in a public bar is at the very least improper and, in our opinion, also falls within the broad dictionary language defining immoral and lewd." Id. (footnote omitted).

Other decisions in the lower Pennsylvania courts have similarly considered whether some form of erotic dancing falls within the terms of the Challenged Provisions without explicitly construing or narrowing those terms. See, e.g., Rising Sun Entm't, Inc. v. Pa. Bureau of Liquor Control Enforcement, 829 A.2d 1214, 1217 (Pa. Commw. Ct. 2003) (stating that "topless dancing performed in licensed establishments can be lewd, immoral or improper entertainment per se"); BJJ Enter., Inc. v. Commonwealth, 481 A.2d 1253, 1255 (Pa. Commw. Ct. 1984) (upholding revocation of liquor license under "lewd, immoral or improper" language where performances included "topless dancing girls who wore panties or G-strings which permitted one to see the pubic area"); Pa. Liquor Control Bd. v. Tris-Dad, Inc., 448 A.2d 690, 691-92 (Pa. Commw. Ct. 1982) (finding statutory standard satisfied where there was evidence that female dancers wore wet nightgowns and displayed various parts of their bodies during their performances). We have found no Pennsylvania court or agency holdings that contain an explicit narrowing construction of the Challenged Provisions. Cf. 181 South v. Fischer, No. 05-1882, 2006 WL 1984497, at *6 (3d Cir. Jul. 18,

2006) (recognizing a narrowing construction of statute where state court explicitly construed a prohibition on "lewd and immoral activities" as a prohibition on entertainment where "'the predominant object and natural effect upon the observers-patrons of one portion of the performance [is] erotic excitation.'") (citation omitted).[3]

Although the Commissioner can point to no explicit narrowing construction of the Challenged Provisions, he argues that an implicit narrowing construction has emerged based on the fact that Pennsylvania courts and agencies have applied the challenged statutory language only to live dancing involving exposure of genitals or involving physical sexual contact between patrons and dancers. We disagree. The fact that the Challenged Provisions have been applied exclusively to such entertainment indicates only that such entertainment falls within the scope of the Challenged Provisions; it does not define the limits of the Challenged Provisions' reach. Past practice does not constitute a narrowing construction because it

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[3] Although in Pennsylvania Liquor Control Board v. CIC Investors No. 870, Ltd., 584 A.2d 1094 (Pa. Commw. Ct. 1990), the Pennsylvania Commonwealth Court held that the erotic dancing in the case satisfied the Statute because it "was a predominant appeal to prurient interests," this language has not been generally adopted by the Pennsylvania courts as a narrowing construction of terms of the Challenged Provisions. 584 A.2d at 1096 (quoting Tahiti Bar, 150 A.2d at 367).

does not bind the enforcement agency, which could, at some point in the future, decide to target a broader range of establishments. This possibility of expanded enforcement creates a chilling effect. See Hicks, 539 U.S. at 119 (expressing concern over the possibility that "the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech").

The Commissioner asserts that the Liquor Board does not intend to enforce the Challenged Provisions against "legitimate" theatrical or concert performances. However, the mere fact that an agency does not currently intend to apply a statute in an unconstitutional manner cannot have the effect of an explicit limiting construction. See Odle v. Decatur County, Tenn., 421 F.3d 386, 397 (6th Cir. 2005) ("neither proof that an ordinance as currently applied has no unconstitutional effect, nor assurances offered by the relevant local authorities that the ordinance will not be put to such an effect in the future, constitute 'constructions' of the ordinance, as that term is ordinarily understood"); see also Ways v. City of Lincoln, Neb., 274 F.3d 514, 519-20 (8th Cir. 2001) (rejecting city's assurances that a statute was "not intended to apply to artistic venues" in considering an overbreadth challenge). But see SOB, Inc. v. County of Benton, 317 F.3d 856, 865 (8th Cir. 2003) (rejecting an overbreadth challenge where a county affidavit noted the absence of theaters in the county and averred a lack of intention to enforce the regulation against theatrical productions with "serious

artistic merit"). In short, the current enforcement intentions of the Liquor Board are of no relevance to our analysis of the scope of the Challenged Provisions.

Thus, we conclude that no limiting construction of the Challenged Provisions has been established by Pennsylvania state courts or agencies. Nor are the plain terms of the Challenged Provisions "readily susceptible" to such a construction; the general prohibition on "lewd" entertainment in any licensed establishment does not lend itself to an obvious narrowing interpretation. See Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 517 (4th Cir. 2002) ("[W]e cannot adopt a limiting construction unless a measure is 'readily susceptible' to such an interpretation by state courts, and certainly cannot rewrite state law") (internal citation omitted); cf. Schultz v. City of Cumberland, 228 F.3d 831, 850 (7th Cir. 2000) (finding statute susceptible to limiting construction where statutory prohibition on commercial establishments "regularly featur[ing]" nudity could be construed more narrowly as applying only to establishments "always featur[ing]" nudity) (emphasis added).

2. Scope of the Challenged Provisions

As no narrowing construction is available, we must consider the scope of the Challenged Provisions based on their plain terms. At the outset, we note that Challenged Provisions proscribe "lewd entertainment" in a notably broad array of contexts. The parties agree that

approximately 15,000 to 18,000 establishments have liquor licenses in Pennsylvania and are subject to the Challenged Provisions.[4] Many of these are ordinary restaurants, but dinner theaters, comedy clubs, and other venues that present some form of entertainment and serve alcohol are also subject to the Challenged Provisions. Moreover, the reach of the Statute extends to all places "operated in connection" with licensed premises. This language presumably applies to performance spaces that serve alcohol in the lobby during intermission.

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[4] "Performing arts facilities" and "public venues" are statutorily-defined establishments that show mainstream performances and have a large seating capacity. See 47 Pa. Stat. Ann. § 1-102 (2005). These establishments are subject to the challenged language in the Statute if they serve alcohol, see 47 Pa. Stat. Ann. § 4-412(f)(4) (2005); 47 Pa. Stat. Ann. § 4-413(g) (2005); but the Commissioner states and Conchatta does not dispute that these establishments are not subject to the Regulation. See 47 Pa. Stat. Ann. § 4-493(10) (2005); 40 Pa. Code § 5.32(b) (2006). Thus, Conchatta may assert the rights of these establishments only with respect to the Statute. Of the approximately 18,000 liquor licensees in Pennsylvania, thirty-one qualify as "performing arts facilities" and forty-eight are "public venues." These separate categories are not critical to our analysis here because, although our finding of overbreadth is related to the impact on these establishments, it is also based on the impact on numerous other liquor licensees that do not qualify in these categories, such as small theaters and other small performance spaces, as well as restaurants or bars that show movies.

Thus, the Challenged Provisions do not solely apply to nude dancing, which "falls only within the outer ambit of the First Amendment's protection," City of Erie v. Pap's A. M. 529 U.S. 277, 289 (2000) (plurality opinion), but also apply to a variety of performances that are entitled to the full protection of the First Amendment, as long as the venues serve alcohol. See Conchatta, 83 Fed. App'x at 444 (noting that the Statute covers "plays, musicals, concerts, political satires, comedies, ballets, dramas, singing performances, dancing performances, poetry readings, and art shows throughout Pennsylvania") (Roth, J dissenting); see also Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 603 (1998) ("art is entitled to full protection because our 'cultural life,' just like our native politics, 'rests upon [the] ideal' of governmental view point neutrality") (citation omitted).[5]

As for what expression falls within the prohibition on "lewd entertainment," we, like the plaintiffs, find this to be a difficult question to answer. The Pennsylvania courts have construed "lewd entertainment" to include entertainment involving fully exposed breasts, genital exposure, or genital touching. As noted above, however, the statutory definition has not been limited to

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[5] Conchatta notes that in an April 5, 2001 opinion (See Plaintiffs' Brief at Addendum 1), the Pennsylvania Liquor Control Board interpreted the Statute to apply to video images. Under this interpretation, the Statute would apply to a movie shown at a bar or other location selling alcohol.

include only entertainment with those characteristics, and this exacerbates the chilling effect on a wide range of First Amendment protected expression when the Challenged Provisions are applied to artistic, theatrical, and other non-adult entertainment venues. We need not here predict, however, how expansively the Pennsylvania courts might construe the prohibition because we conclude, in light of the broad array of forms of entertainment to which the prohibition is applicable, that even assuming the Challenged Provisions proscribe no more than entertainment involving nudity or genital touching, those Provisions are unconstitutionally overbroad.

3. Secondary Effects and the Standard of Review

We accept the Commissioner's assertion that the Challenged Provisions were enacted to limit negative secondary effects resulting from the combination of "lewd" entertainment and consumption of alcohol.[6] See Purple Orchid, 813 A.2d at 810 (concluding that one of the Statute's purposes is "to address the negative secondary effects that follow when nude dancing is performed in establishments that are licensed to

[6] Legislation intended to curb the negative secondary effects of entertainment establishments is often aimed at "crime rates, property values, and the quality of the city's neighborhoods." City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434 (2002).

serve alcohol"). Such an intention is unrelated to the content of the affected expression. See City of Erie, 529 U.S. at 296 (holding that a regulation aimed at the secondary effects of adult entertainment establishments was "unrelated to the suppression of the erotic message" and therefore content-neutral) (plurality opinion); Carandola, 303 F. 3d at 515 (finding a statute to be content-neutral because it targeted the secondary effects of lewd conduct on liquor-licensed premises).

Where, as here, a regulation burdens expression but is content-neutral, we apply the intermediate scrutiny standard enunciated by the Supreme Court in United States v. O'Brien, 391 U.S. 367 (1968). See Texas v. Johnson, 491 U.S. 397, 407 (1989) (stating that O'Brien test applies where "the governmental interest in question [is] unconnected to expression"); 181 South, 2006 WL 1984497, at *4-5 (applying O'Brien test to liquor-license regulation of adult entertainment establishments).[7] Under the

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[7] We note that the fact that the Challenged Provisions implicate Pennsylvania's authority to regulate liquor consumption does not affect the level of scrutiny applied. Although the Supreme Court held in California v. LaRue, 409 U.S. 109, 118-19 (1972) that a state has special authority under the Twenty-first Amendment to limit certain First Amendment rights in locations serving alcohol, that holding was overturned in 44 Liquormart, 517 U.S. at 516. See 181 South, 2006 WL 1984497, at *4 (noting that after 44 Liquormart, states no longer have enhanced authority under the Twenty-first

O'Brien test, a regulation is constitutional only if (1) "it is within the constitutional power of the Government"; (2) it "furthers an important or substantial governmental interest"; (3) "the governmental interest is unrelated to the suppression of free expression"; and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." O'Brien, 391 U.S. at 377; see also 181 South, 2006 WL 1984497, at *4. The fourth element of this test is particularly relevant to our overbreadth inquiry here.[8]

We conclude that the Challenged Provisions are substantially overbroad under the fourth O'Brien requirement because the asserted government interest is not applicable to a large number of affected establishments. With respect to nude or topless dancing at clubs or bars, an interest in limiting harmful secondary effects may justify the Challenged Provisions. See Carandola, 303 F.3d at 516 (noting that nude or

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Amendment to regulate expression in places that serve alcohol).

[8] There is no question, as to the first three prongs of the O'Brien test, that Pennsylvania has the constitutional authority to enact legislation such as the Challenged Provisions, that Pennsylvania's interest in limiting certain secondary effects related to liquor-licensed venues is substantial, and that this interest is unrelated to the suppression of free expression. See 181 South, 2006 WL 1984497, at *5 (finding O'Brien test satisfied with respect to state regulation targeting secondary effects of erotic entertainment in liquor-licensed venues).

topless dancing has "'a long history of spawning deleterious effects'" and "in most cases a city or state need carry only a minimal burden to demonstrate its interest in regulation of such activity") (citation omitted). With respect to ordinary theater and ballet performances, concerts, and other similar forms of entertainment, however, the Commissioner provides no evidence that the Challenged Provisions prevent harmful secondary effects, and we are exceedingly doubtful that they do. Without evidence of such a connection, there is no state interest to justify a substantial fraction of the Challenged Provisions' scope. The statutory language clearly could have been drafted more narrowly to specifically target secondary effects associated with nude or topless dancing. See Erznoznik, 422 U.S. at 217-18 ("Where First Amendment freedoms are at stake . . . precision of drafting and clarity of purpose are essential."); Carandola, 303 F.3d at 517 (observing, with approval, that "jurisdictions with concerns [about adult entertainment] have adopted narrower regulations, targeting only those venues where secondary effects are likely to arise, while leaving other speech unaffected."). Thus, the restriction on First Amendment freedoms is significantly greater than is essential to the furtherance of the government interest, and the Challenged Provisions fail the fourth requirement of the O'Brien test.

Several of our sister circuits have similarly found that a secondary effects rationale cannot justify regulation of such a broad array of ordinary entertainment venues. See, e.g.,

Schultz, 228 F.3d at 849 ("When the government restricts speech not associated with harmful secondary effects, then the government cannot be fairly said to be regulating with those secondary effects in mind and the regulation extends beyond its legitimate reach."); Carandola, 303 F.3d at 516-17 (finding likelihood of success on overbreadth claim where liquor-license regulation swept "far beyond bars and nude dancing establishments" to burden "a multitude of mainstream musical, theatrical, and dance productions — from musical comedy to ballet to political satire to flamenco dance"); Odle, 421 F.3d at 399 (finding an ordinance unconstitutionally overbroad because it "'makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions. Instead, [it] sweeps within its ambit expressive conduct not generally associated with' the kinds of harmful secondary effects it was designed to prevent.") (quoting Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 136 (6th Cir. 1994)); Ways, 274 F.3d at 519-20 (rejecting secondary effects rationale and finding ordinance to be unconstitutionally overbroad because it could be applied to "theater performances, ballet performances, and many other forms of live entertainment").

Based on the reasoning above, we conclude that the Challenged Provisions "punish[] a 'substantial' amount of protected free speech, 'judged in relation to [their] plainly

legitimate sweep," and that they are therefore unconstitutionally overbroad.[9]

### B. Other Claims

In addition to its facial overbreadth claim, Conchatta asserts that the Challenged Provisions are unconstitutional as applied, and that the Challenged Provisions are unconstitutionally vague on their face. Because we strike down the Challenged Provisions as substantially overbroad, we need not consider either of these claims.

## III. CONCLUSION

For the foregoing reasons, we reverse the judgment of the District Court with respect to the denial in part of Conchatta's motion for summary judgment, and we remand the case for further proceedings consistent with this opinion.

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[9] The Commissioner argues that even if the Challenged Provisions are overbroad, this overbreadth can be eliminated by severance of the subsections of the Liquor Code applying the Statute to statutorily-defined "performing arts facilities" and "public venues." See supra note 5. As noted above, a high seating capacity, among other requirements, is necessary to qualify in these categories, and only 79 of the more than 15,000 liquor-licensed establishments in Pennsylvania qualify. Those that do not qualify include low seating capacity performance spaces that serve alcohol. Severance of the relevant provisions would therefore do little to limit the substantial overbreadth of the Challenged Provisions.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1803

CONCHATTA INC., t/d/b/a CLUB RISQUE ON THE DELAWARE;
GAIL BAKER; SABRINA BARRAR,

Appellants,

v.

COL. JEFFREY B. MILLER, IN HIS OFFICIAL CAPACITY AS
COMMISSIONER, PENNSYLVANIA STATE POLICE,

Appellee,

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 01-cv-01207)
District Court Judge: Honorable John P. Fullam

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER,
McKEE, BARRY, AMBRO,
FUENTES, SMITH VAN ANTWERPEN,
CHAGARES,

STAPLETON* and ALARCON,** Circuit Judges.

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The Petition for Rehearing filed by the Appellee in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/Julio M. Fuentes
Circuit Judge

DATED: September 15, 2006
LML/cc: J. Michael Murray, Esq.
John O. J. Shellenberger, III, Esq.

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*Judges Stapleton and Alarcón's votes are limited to panel rehearing only.

**The Honorable Arthur L. Alarcôn, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

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|---|---|---|
| CONCHATTA, INC, GAIL BAKER, and SABRINA BARRAR | : | CIVIL ACTION |
| v. | : | |
| COL. PAUL J. EVANKO, in his Official Capacity as Commissioner, Pennsylvania State Police | : | NO. 01-01207-JF |

MEMORANDUM AND ORDER

Fullam, Sr. J. February , 2005

Plaintiffs challenge the constitutional validity of that portion of the Pennsylvania Liquor Code which prohibits "lewd, immoral or improper entertainment" in licensed premises, 47 P.S. § 4-493(10), and a related regulation of the Liquor Control Board enacted pursuant to the statute which prohibits contact with patrons on such premises for a "lewd, immoral, improper or illegal purpose." 40 Pa. Code §5.32(c).

At an earlier stage of this litigation, plaintiffs sought a preliminary injunction against enforcement of the statute and regulation. After hearing, I denied the application for preliminary injunction, on the

ground that plaintiffs' likelihood of success on the merits was somewhat doubtful, and that plaintiffs had not established that they would suffer irreparable harm in the absence of preliminary relief. I also noted that the same constitutional issues were about to be addressed by the Pennsylvania Supreme Court, (in the appeal which later produced Purple Orchid, Inc. v. Pennsylvania State Police, 572 Pa. 171, 813 A.2d 801 (2002)). I therefore entered an order staying all further proceedings in this case until the Pennsylvania Supreme Court acted on the appeal.

Plaintiffs appealed the denial of preliminary relief to the Third Circuit Court of Appeals which, by a two-to-one vote, affirmed. Although both the majority and dissenting opinions expressed the view that plaintiffs' likelihood of success on the merits was much stronger than my opinion had suggested, the majority affirmed my decision on the alternate ground, namely, absence of irreparable harm.

Following remand, the litigation proceeded in this court, and has eventuated in cross-motions for summary judgment, now before the court for decision.

At the preliminary injunction stage, plaintiffs had asserted only a facial challenge to the statute and regulation, and neither this court nor the Court of Appeals expressed any view as to the possible validity of an "as applied" challenge. This is not surprising, since neither the statute nor the regulation has ever been

applied to these plaintiffs, and their desired course of conduct was not specified. Their concern is that, because of the alleged over-breadth and vagueness of the statutory and regulatory provisions, they are unable to ascertain just what is and what is not forbidden, hence their freedom of expression is being curtailed, in violation of the First Amendment of the United States constitution.

The Third Circuit decision was rendered after the Pennsylvania Supreme Court had decided the appeal which was pending when this case was initially before this court. In a comprehensive opinion by Mr. Justice Castille, which exhaustively reviewed United States Supreme Court precedent in this area, the Court upheld the statute and regulation involved here, as applied to proscribe totally nude dancing in licensed establishments -- i.e., that requiring minimal covering of genitalia (pasties and G-strings) was constitutionally permissible. The Court carefully avoided deciding whether the statute and regulation were unconstitutionally vague, since that issue had not been raised by the appellant.

There can be no doubt that the terms "immoral or improper" are vague; their meaning may vary with the views of the beholder. But, as noted by the defendants, the term "lewd" has, over time, acquired a well-understood meaning. At common law, a lewd act was "an act of open indecency which tends to corrupt the morals of the community." Commonwealth v. Heinbaugh, 467 Pa. 1, 8, 354 A.2d 244, 247 (1976). The

Model Penal Code has included "open lewdness" as a crime, defined as "any lewd act" which is likely to be observed by others who would be affronted or alarmed. Model Penal Code § 251.1. The same definition of "open lewdness" is set forth in Pennsylvania's Criminal Code, 18 Pa. C.S. § 5901. In Osborne v. Ohio, 495 U.S. 103, 113, 114 (1990), the Court upheld a state statute outlawing possession of images of nude children where the nudity constituted "lewd exhibitions." The majority specifically held that the term "lewd" by itself sufficiently defined what was prohibited. In Winters v. New York, 337 U.S. 507, 518 (1948), the Court held that the words "lewd" and "lascivious" were well understood through long use and were sufficiently clear so as not to constitute unconstitutional vagueness. See also Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 572 (1942)(prohibition on "lewd" speech).

A statute is unconstitutionally vague if it does not provide reasonably clear notice of what is and what is not prohibited. But the statute must be considered in conjunction with the interpretation uniformly applied by the appellate courts. In light of those decisions, I believe plaintiffs are adequately apprised of what they may or may not do in order to avoid "lewd" performances or activities.

Thus, if the statute prohibited "lewd, immoral and improper" conduct, - i.e., if the words "immoral" and "improper" were qualified by a requirement of lewdness, the statute would, in my view, pass constitutional muster.

But, on its face, the statute can be read as prohibiting "immoral" or "improper" conduct. I believe it appropriate, therefore, to accept the suggestion made in the defendants' brief, namely, that the words "immoral or improper" be, in effect, excised from the statute.

For the reasons so carefully explained by Mr. Justice Castille in the Purple Orchid decision, I am persuaded that the statute is primarily directed at conduct, not speech, and that it meets all four of the requirements of United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). I further conclude that the statute's prohibition of "lewd" entertainment is not unconstitutionally vague. An Order will be entered granting in part plaintiffs' application for injunctive relief, precluding the defendants from enforcing the statute and regulation to the extent they prohibit "immoral or improper" conduct, but denying injunctive relief with respect to "lewd" conduct.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

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| CONCHATTA, INC, | : | CIVIL ACTION |
| GAIL BAKER, and | : | |
| SABRINA BARRAR | : | |
| | : | |
| v. | : | |
| | : | |
| COL. PAUL J. EVANKO, | : | |
| in his Official Capacity | : | |
| as Commissioner, | : | |
| Pennsylvania State | : | |
| Police | : | NO. 01-01207-JF |

ORDER

AND NOW, this day of February 2005, upon consideration of the pending cross-motions for summary judgment, IT IS ORDERED:

1. Plaintiffs' motion for summary judgment is GRANTED IN PART. The defendants are enjoined from enforcing so much of the challenged statute and regulation as proscribe "immoral or improper" entertainment or related conduct. The statute and regulation may continue to be enforced with respect to "lewd" entertainment or conduct.

2. Defendants' cross-motion for summary judgment is DENIED.

BY THE COURT:

/s/John P. Fullam
John P. Fullam, Sr. J.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 01-2220

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CONCHATTA, INC., t/d/b/a CLUB RISQUE ON THE DELAWARE; GAIL BAKER; SABRINA BARRAR,

v.

PAUL J. EVANKO, COL., IN HIS OFFICIAL CAPACITY AS COMMISSIONER, PENNSYLVANIA STATE POLICE

—

Conchatta, Inc., Gail Baker and Sabrina Barrar,

Appellants

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Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil Action No. 01-cv-01207)
District Judge: Honorable John P. Fullam

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Argued January 15, 2002

Before: ALITO and ROTH, Circuit Judges

SCHWARZER*, District Judge
(Opinion filed December 12, 2003)

J. Michael Murray, Esquire (Argued)
Steven D. Shafron, Esquire
Berkman, Gordon, Murray & DeVan
55 Public Square
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* Honorable William W. Schwarzer, Senior District Judge for the Northern District of California, sitting by designation.

## OPINION

PER CURIAM:

This is an appeal from a District Court order denying a request for a preliminary injunction against the Pennsylvania Liquor Code's ban on "lewd, immoral or improper entertainment." 47 P.S. § 4-493(10). We affirm.

I.

Plaintiff Conchatta, Inc. operates a "gentleman's club" in Philadelphia and holds a liquor license. The other two plaintiffs, Gail Baker and Sabrina Barrar, are erotic dancers at the club. The dancers begin clothed and then strip until they are wearing only G-strings and latex covering over their nipples. They then circulate among the patrons seeking tips. There are also rooms in which dancers perform private dances for a fee. The club prohibits physical sexual contact between the dancers and patrons.

A provision of the Pennsylvania Liquor Code dating back to 1951, 47 P.S. 493 (10), prohibits "lewd, immoral, or improper entertainment" in a facility holding a liquor license or in any place operated in connection therewith, and an implementing regulation, 40 Pa. Code § 5.32(c), contains similar language.

The plaintiffs moved for a preliminary injunction against the enforcement of these provisions, and the District Court, after conducting an evidentiary hearing, denied the motion. The District Court noted that in California v. LaRue, 409 U.S. 109 (1972), and subsequent cases the Supreme Court upheld the constitutionality of laws prohibiting nude or lewd entertainment in establishments serving alcohol. The Court also observed that, while the Supreme Court's opinion in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996), disapproved of some of the reasoning in LaRue, the Court "made clear that it was not retreating from the holding in California v. LaRue." Dist. Ct. Op. at 4. The District Court stated that its review of Supreme Court precedent led it to the conclusion that the plaintiffs' likelihood of success was "uncertain at best." Id. at 5.

The District Court noted that the plaintiffs also challenged the statute and regulation based on overbreadth and vagueness, but the Court "decline[d] to address these issues, at this juncture" and instead "abstained, in deference to pending state court litigation, under Railroad Commission of Texas v. Pullman Company, 312 U.S. 496 (1941)." Id. at 6. The District Court commented that the statute and regulation at issue in this case were then before the Supreme Court of Pennsylvania in Purple Orchid, Inc. v. Pennsylvania State Police, 721 A.2d 84 (Pa. Commw. 1998), appeal granted, 740 A.2d 1150 (Pa. 1999), and that related issues were also before that Court in the remand from the United States Supreme Court in City of Erie v. Pap's

A.M., 529 U.S. 277 (2000). Dist. Ct. Op. at 6. The District Court then wrote:

> In my view, the only issue it is appropriate for this court now to consider is whether, pending the state courts' action, plaintiffs are likely to suffer irreparable harm which should be prevented by preliminary injunctive relief. On the basis of the evidentiary record, I am not convinced that any significant harm will be sustained by any of the plaintiffs. So far as the record discloses, the plaintiffs have never been cited for violating the statute or regulations, and there is no imminent threat of such action. The only evidence presented at the hearing was to the effect that the two dancers would prefer to be allowed to dance without any covering on their nipples, and the club would prefer to present that form of entertainment to its customers. Whether there is any cognizable difference in self-expression between what the individual plaintiffs are now doing and what they say they would prefer is indeed problematic. If there is a difference, I am satisfied that it represents such a minimal restriction on their right of self-expression that it may safely be ignored as a basis for interim injunctive relief.

Id. at 6-7. This appeal followed.

When we heard oral argument in this case the two Pennsylvania Supreme Court cases to

which the District Court had referred were still pending. Some time later, however, the Pennsylvania Supreme Court handed down decisions in both cases. In Pap's A.M. v. City of Erie, 812 A.2d 591 (Pa. 2002) (Pap's III), which concerned an establishment that featured totally nude erotic women dancers, the Pennsylvania Supreme Court held that a municipal ordinance prohibiting public nudity violated the freedom of expression provision of Article I, § 7 of the Pennsylvania Constitution. The Court concluded that nude dancing is expressive conduct and reasoned that the fact that nude dancing does not ascend to the "level of high art form" does not mean that "the expression is unprotected." Id. at 602-03.

In the second case, Purple Orchid Inc. v. Pennsylvania State Police, 813 A.2d 801 (Pa. 2002), the Pennsylvania Supreme Court affirmed the Commonwealth Court's decision that § 4-493(10), the provision at issue in the present case, does not violate the First Amendment of the United States Constitution. The Court held that § 4-403(10), as applied to nude dancing in an establishment holding a liquor license, is a content-neutral restriction on expressive conduct which must be subjected to intermediate scrutiny under the four-factor test of United States v. O'Brien, 391 U.S. 367 (1968). 813 A.2d at 809, 812. The Court did not decide whether § 4-493(10) violates the guarantee of freedom of expression found in Article I, § 7 of the Pennsylvania Constitution or whether § 4-493(10) is void for vagueness because the Court

held that appellants had waived both issues. 813 A.2d. at 804-05.

After the Pennsylvania Supreme Court issued its opinions in these two cases, we received supplemental briefs addressing their impact on this appeal.

II.

The primary issue before us concerns the District Court's refusal to grant a preliminary injunction.[10] Under the familiar standard for

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[10] The plaintiffs have asked us to review the District Court's decision to grant the stay. We need not do so because the appeals have been decided and the issue is now moot. We note, however, that were the issue ripe for review, we still would not have jurisdiction to do so because the District Court's stay was not a final order under either 28 U.S.C. § 1291 or the collateral order doctrine.

As a rule, a "stay is not ordinarily a final decision for purposes of § 1291, since most stays do not put the plaintiff effectively out of court." Moses H. Cone v. Mercury Construction Co., 460 U.S. 1, 10 n.11 (1983). As we have noted, stay orders that merely have the practical effect of allowing a state court to be the first to rule on a common issue are not appealable. Trent v. Dial Medical of Florida Inc., 33 F.3d 217, 221 (3d Cir. 1994) (quoting Moses H. Cone). Nor do we find that plaintiffs fell under the exception to this rule noted in Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 714 (1962), because unlike the plaintiff in Idlewild, plaintiffs here were not effectively out of court when the stay was granted. See Wright, Miller & Cooper 15A Federal Practice and Procedure § 3914.14.

granting a preliminary injunction, a plaintiff must show both (1) that the plaintiff is reasonably likely to succeed on the merits and (2) that the plaintiff is likely to experience irreparable harm without the injunction. Adams v. Freedom Forge Corp., 204 F.3d 475, 484 (3d Cir. 2000). If these factors are shown, the effect on the nonmoving parties and the public interest may be considered. Id. at 484. In a preliminary injunction appeal, we review legal questions, including plaintiffs' likelihood of success on the merits of their First Amendment claims, de novo. ACLU v. Reno, 217 F.3d 162, 172 (3d Cir. 2000), vacated on other grounds, 122 S.Ct. 1700. The District Court's overall decision to deny injunctive relief is reviewed for abuse of discretion, "which occurs if the district court's decision rests on a clearly erroneous finding of fact, an error of law, or a misapplication of law to the facts." Marco v. Accent Publishing Co., 969 F.2d 1547, 1548 (3d Cir. 1992).

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Nor did we have jurisdiction to review the stay under the collateral order doctrine. That doctrine creates a narrow exception allowing us to review certain orders before a final judgment on the merits. Under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), such an order must (1) finally resolve a disputed question, (2) raise an important issue distinct from the merits of the case, and (3) be effectively unreviewable on appeal from a final judgment. We conclude that the District Court's stay order did not finally resolve a disputed question nor did it raise an important issue distinct from the merits; it merely caused a delay.

III.

We first address the issue of the plaintiffs' likelihood of success on the merits. The plaintiffs' complaint challenges the statute both on its face and as applied, but the plaintiffs have not raised the as-applied argument on appeal. In their brief, the plaintiffs argue forcefully and at length that they established a likelihood of success for two reasons and two reasons only. In Part I.A of their brief, the plaintiffs contend that the statute and regulation are unconstitutionally overbroad, see Appellants' Br. at 19-41, and in Part I.B the plaintiffs maintain that the statute and regulation are unconstitutionally vague. Id. at 42-53. The plaintiffs do not argue that they established a likelihood of success on their as-applied claim[11], and therefore we do not decide

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[11] The mere mention of the phrase "as applied" in the statement of the issues in the appellants' brief is insufficient to raise that issue. See In re Trans World Airlines, 145 F.3d 124, 133 (3d Cir. 1998); Reynolds v. Wagner, 128 F.3d 166, 178 (3d Cir. 1997) ("an argument consisting of no more than a conclusory assertion . . . will be deemed waived"); Southwestern Pa. Growth Alliance v. Browner, 121 F.3d 106, 122 (3d Cir. 1997) ("appellate courts should generally not address legal issues that the parties have not developed through proper briefing"); Commonwealth of Pa. v. HHS, 101 F.3d 939, 945 (3d Cir. 1996) (arguments mentioned in passing but not squarely argued will be deemed waived); Laborers' Intern. Union v. Foster Wheeler Energy, 26 F.3d 375, 398 (3d Cir. 1994) ("'a passing reference to an issue . . . will not suffice to bring that issue before this court'") (citation omitted).

that issue. "We generally do not raise new issues on our own motion unless federal jurisdiction is implicated," Bolden v. Southwestern Pa. Transp. Auth., 953 F.2d 807, 821 (3d Cir. 1991) (en banc), and there is no good reason to depart from that rule here.

While the plaintiffs have not adequately pressed an as-applied argument on appeal, they have made a strong case that the statute is overbroad. During the past 30 years, the United States Supreme Court has issued a string of opinions dealing with the subject of erotic dancing, both in bars and other establishments, but the central language in the Pennsylvania statute has not been revamped in more than a half-century. We need not decide, however, whether the Pennsylvania statute as currently framed will ultimately be able to withstand a challenge for either overbreadth or vagueness. For present purposes we will assume that the plaintiffs established a likelihood of success on their overbreadth and vagueness claims. As we explain below, the plaintiffs are nevertheless not entitled to a preliminary injunction because, as the District Court held, the plaintiffs failed to show that the denial of their motion for a preliminary injunction would result in irreparable harm.

IV.

Our Court has held that a plaintiff must show irreparable harm in order to obtain a preliminary injunction. Adams v. Freedom Forge, 204 F.3d 475, 484 (3d Cir. 2000); Instant

Air Freight Co. v. C.F. Air Freight, 882 F.2d 797, 800 (3d Cir. 1989); Marxe v. Jackson, 833 F.2d 1121, 1128 (3d Cir. 1987). "We have repeatedly insisted that the use of judicial power to arrange relationships prior to a full determination on the merits is a weighty matter, and the preliminary injunction device should not be exercised unless the moving party shows that it specifically and personally risks irreparable harm." Adams, 204 F.3d at 487. While other circuits relax the irreparable harm requirement in First Amendment cases, our Court requires a First Amendment plaintiff seeking a preliminary injunction to prove irreparable harm. In Hohe v. Casey, 868 F.2d 69, 72-73 (3d Cir. 1989), we observed that "the assertion of First Amendment rights does not automatically require a finding of irreparable injury." Instead, we wrote, "plaintiff[] must show 'a chilling effect on free expression.'" Id. In Anderson v. Davila, 125 F.3d 148 (3d Cir. 1997), we held that plaintiffs who had shown a likelihood of success on the merits of their First Amendment claim would not be entitled to preliminary injunctive relief unless they could show a "'real or immediate'" danger to their rights "in the near future." Id. at 164. Although Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion), observed that the "loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury," we provided the following explanation in Anderson:

> In Elrod, the Supreme Court held that public employees had a First Amendment right not to be fired solely because of their

> affiliation with a political party. Nothing in that case suggests that the Court meant to do away with the traditional prerequisites for injunctive relief simply because First Amendment freedoms were implicated. To the contrary, the Court concluded that injunctive relief was warranted because the plaintiffs' First Amendment injuries were "both threatened and occurring at the time of respondents' motion." Elrod, 427 U.S. at 374, 96 S. Ct. at 2690.

Id.[12]

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[12] The statement in Elrod that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" addresses the requisite duration of a deprivation of First Amendment rights, but does not suggest that a real or threatened deprivation need not occur. In several cases, we have quoted this statement in the course of holding that irreparable injury had been shown, but in all those cases actual or threatened irreparable harm was shown. See Tenafly Eruv Assoc. v. The Borough of Tenafly, 309 F.3d 144, 178 (3d Cir. 2002) (disabled persons and persons with small children unable to attend synagogue); Swartzwelder v. McNeilly, 297 F.3d 228, 241 (3d Cir. 2002) (police officer with "demonstrated proclivity to offer expert testimony" prevented from doing so); ACLU v. Reno, 217 F.3d 162, 180 (3d Cir. 2000), vacated on other grounds, Ashcroft v. ACLU, 535 U.S. 564 (2002) (web publishers prevented from publishing materials held to be constitutionally protected); Abu-Jamal v. Price, 154 F.3d 128, 136 (3d Cir. 1998) (unconstitutional investigation "both threatened and occurring"); In re Asbestos School Litigation, 46 F.3d 1284, 1294-95 (3d Cir. 1994)

In the present case, the plaintiffs did not show that there was a real or immediate threat to their own First Amendment rights. As noted by the District Court, "[s]o far as the record discloses, the plaintiffs have never been cited for violating the statute or regulations, and there is no imminent threat of such action." Dist. Ct. Op. at 7. The operator of Club Risque did not offer evidence that the enforcement of the challenged statute and regulation presented a threat of economic harm. The full extent of the plaintiff's' showing on irreparable harm is found in the dancers' testimony, which is summarized as follows in the plaintiffs' brief:

> Gail Baker . . . testified that because she does not know what is embraced by the regulations, she has danced differently than she otherwise would, for if she moved her hips a certain way, it might

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(company precluded from engaging in public dialogue on important issue). Cf. In re School Asbestos Litigation, 842 F.2d 671, 679 (3d Cir. 1988) (in applying collateral order doctrine, court holds that loss of right to engage freely in public communications is irreparable injury). It is true that in one of the above cases, we quoted the statement that "[i]n a First Amendment challenge," a plaintiff who establishes a likelihood of success "will almost certainly" show irreparable harm. ACLU v. Reno, 217 F.3d at 180 (quoting ACLU v. Reno, 929 F. Supp. 824, 866 (E.D. Pa. 1996)). But this statement is dictum in an opinion that has been vacated and is inconsistent with governing circuit precedent.

> be construed as being illegal. Sabrina Barrar, too, testified that uncertainty in the law altered her performances.

Appellants' Br. at 60.

It is important to note that the plaintiffs have not made an as-applied argument on appeal, and accordingly they have not shown that the statute likely violates their own First Amendment rights by inhibiting their dancing in the ways noted above. In view of this fact, the fact that the only apparent effects on the dancers are self-imposed, the fact that the statute has not been enforced or threatened to be enforced against the plaintiffs, and the fact that no economic harm has been claimed, we cannot say that the District Court erred in concluding that irreparable harm was not established.

V.

For these reasons, we will affirm the order of the District Court denying the plaintiffs' request for a preliminary injunction.

**ROTH**, Circuit Judge, dissenting.

I respectfully dissent. I disagree with the majority that the denial of plaintiffs' motion for a preliminary injunction would not result in irreparable harm. The plaintiff dancers have already suffered irreparable harm and will continue to suffer irreparable harm if their

motion for a preliminary injunction is not granted.

As to the plaintiffs' facial challenge to § 4-493(10), the majority simply assumes likelihood of success on the merits only to conclude that the plaintiffs did not meet their burden of proving irreparable harm. I find it relevant to the discussion of irreparable harm to first consider the plaintiffs' probability of success on their facial challenge.

**I. Probability of success on the merits**

The majority notes that the plaintiff's "have made a strong case that the statute is overbroad." Majority at [typescript at 8]. Indeed, this overbreadth argument has merit and presents a ground upon which plaintiffs are likely to succeed in their challenge of the constitutionality of § 4-493(10).

"A regulation is unconstitutional on its face on overbreadth grounds where there is 'a likelihood that the statute's very existence will inhibit free expression' by 'inhibiting the speech of their parties who are not before the Court.'" Saxe v. State College Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984). It is, of course, necessary to proceed with caution and restraint when considering a facial challenge. Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975). Nevertheless, § 4-493(10) runs afoul of the overbreadth doctrine by penalizing a

"substantial amount of speech that is constitutionally protected." Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 129 (1992) (quoting Broadbrick v. Oklahoma, 413 U.S. 601 (1973)).

As an initial matter, § 4-493(10)'s language prohibiting "lewd, immoral, or improper entertainment" in a liquor-licensed establishment encompasses a wide range of constitutionally protected expression. The reach of § 4-493(10) was substantially expanced when the legislature extended its coverage to include all places "operated in connection" with licensed premises, including a vast number of halls or theaters in which live musical, concert, dance, ballet, and "legitimate" play productions are performed. 47 P.S. § 4-493(10); 47 P.S. § 4-413(g); 47 P.S. § 1-102. Thus, the Liquor Code establishes a standard of propriety governing a number of plays, musicals, concerts, political satires, comedies, ballets, dramas, singing performances, dancing performances, poetry readings, and art shows throughout Pennsylvania. It gives Pennsylvania police officers wide latitude to choose which one of these performances to penalize on the ground that they are lacking in propriety. Indeed, the Commonwealth admitted as much at oral argument, when it stated that, in theory, officers could cite a performance of the musical "Hair" under § 4-493(10).[13]

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[13]In the context of a prior restraint analysis, the Supreme Court has held that "Hair" is protected speech despite its use of "group nudity and

By its terms, therefore, § 4-493(10) prohibits a great deal of protected speech. The overbreadth doctrine does not allow such chilling of free expression if it could be avoided by a more carefully drafted statute. Reno v. ACLU, 521 U.S. 844, 874 (1997); Erznoznik, 422 U.S. at 217-18 ("precision of drafting and clarity of purpose are essential" where First amendment freedoms are at stake); Carandola, Ltd. v. Bason, 303 F.3d 507, 516-18 (4th Cir. 2002). The Pennsylvania legislature violated this requirement when it imposed the far-reaching prohibitions of § 4-493(10).

Unable to defend § 4-493(10) as it is written, the Commonwealth vigorously argues that the statute's application is not nearly as broad as its terms suggest. At oral argument, the Commonwealth asserted that the statute operates only as a prohibition on nude dancing. Thus, it reasons, § 4-493(10) would seem no more objectionable than ordinances approved by the Supreme court in City of Erie v. Pap's A.M., 529 U.S. 277 (2000) and Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991).

Here though, the reach of § 4-493(10) exceeds the narrow construction proffered by the Commonwealth on appeal. Because of the breadth of § 4-493(10)'s language, it is not clear what entertainment the Pennsylvania regulators will penalize. Would it be immoral or improper

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simulated sex." Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 550, 557-558 (1975).

to celebrate Bloomsday by reading aloud from James Joyce's *Ulysses* in an Irish pub? And how would the Liquor Commission view "brew and view" theaters showing films such as *Trainspotting, American Pie,* or *Lolita*? These questions become increasingly troublesome in light of the sheer amount of entertainment at performing arts facilities that is now subject to this vague standard of propriety. See Ways v. City of Lincoln, Neb., 274 F.3d 514, 519 (8th Cir. 2001) (when finding that ordinance prohibiting "sexual contact" was overbroad, court found ordinance's broad application to artistic venues "most significant" in distinguishing it from more limited ordinances that were constitutional). A broad array of entertainment appears well within the bounds of the state's regulatory authority under § 4-493(10), but there is no way to tell whether certain performances would in fact be banned. The broad terms of § 4-493(10) leave such decisions to the discretion of Pennsylvania officials and, in so doing, those terms violate the requirements of the First Amendment. This unbridled government discretion, leaving a wide degree of latitude for value judgments as to artistic merit, is precisely what the First Amendment does not allow. See Carandola, 303 F.3d at 516-18.

Thus, the fact that § 4-493(10) creates a standard of propriety applicable to a broad array of entertainment throughout Pennsylvania cannot be avoided. The state's terms create such a real and substantial restriction on speech that they violate the overbreadth doctrine. The District Court erred by overlooking this

meritorious legal argument when it denied plaintiffs' request for a preliminary injunction.

Furthermore, Pap's A.M. v. City of Erie, 812 A.2d 591 (Pa. 2002) and Purple Orchid Inc. v. Pennsylvania State Police, 813 A.2d 801 (Pa. 2002), the two recently decided Pennsylvania Supreme Court cases that the majority discusses briefly, illustrate that the Pennsylvania Supreme Court, when confronted with the right challenge, will have the opportunity to address the overbroad nature of § 4-493(10).

In Pap's A.M. v. City of Erie, the Pennsylvania Supreme Court held that the City of Erie's public decency ordinance violated the freedom of expression provision of Article I, § 7 of the Pennsylvania Constitution, and severed the unconstitutional provisions from the ordinance. 812 A.2d at 602-03. Because the court held that the ordinance violated the Pennsylvania Constitution, it did not go on to consider whether the ordinance was unconstitutionally overbroad, an issue on which the court had requested the parties to provide briefing. Id. at 599, 613 n.11.

In Purple Orchid Inc. v. Pennsylvania State Police, the Pennsylvania Supreme Court affirmed the Commonwealth Court's decision that § 4-493(10) does not violate the First Amendment of the U.S. Constitution. The court held that § 4-493(10), as applied to nude dancing in an establishment holding a liquor license, is a content-neutral restriction on

expressive conduct which must be subjected to intermediate scrutiny under the four-factor O'Brien test. Purple Orchid, 813 A.2d at 809, 812.

The court was careful, however, to point out what it was not deciding. The court did not address whether § 4-493(10) violated the guarantee of freedom of expression found in Article I, § 7 of the Pennsylvania Constitution. Nor did the court address whether § 4-493(10) is unconstitutional for vagueness, because lewd, immoral, or improper entertainment is incapable of being discerned in advance, or whether § 4-493(10) is unconstitutionally overbroad. The court held that the appellants had waived those issues. Id. at 804-05. The court in Purple Orchid made very clear that it was interpreting § 4-493(10) only as applied to the nude dancing involved there. The language of § 4-493(10) is certainly broader than a ban on nudity. Indeed, as the court noted, "nudity, much less nude dancing" is not specifically mentioned in the statute. Id. at 809.

## II. Irreparable Injury

Because the District Court failed to recognize that § 4-493(10)'s restrictions violate the First Amendment, it also failed to properly analyze irreparable injury. When the record considered by the District Court is evaluated under the proper legal standard, it is plain that the court abused its discretion when it denied plaintiffs' request for a preliminary injunction.

First, irreparable injury should have been considered under the general rule that the "loss of First amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elron v. Burns, 427 U.S. 347, 373 (1976). Plaintiffs have shown irreparable injury under this rule.

The entertainment regulated by § 4-493(10) is not limited to the spoken or written word. It is not, however, just the spoken or written word which is protected by the First Amendment. Conduct other than that which is spoken or written may also be protected if it presents "sufficient communicative elements" to constitute expression. Texas v. Johnson, 491 U.S. 397, 404 (1989). There is no doubt that dancing may contain sufficient communicative elements to justify First Amendment protections. See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) ("nude dancing is not without its First Amendment protections from official regulation").

Because dancing is conduct that may be protected by the First Amendment, the fact that the dancing is erotic or sexually suggestive does not then strip it of its First Amendment protection. Such dancing receives the same degree of protection as other forms of communication. As we have stated, "[s]peech, be it in the form of film, live presentations, or printed matter, that is sexually explicit in content but not 'obscene' is protected under the First Amendment." Phillips v. Borough of Keyport, 107 F.3d 164, 172 (3d Cir. 1997) (en

banc); see also Sable Communications v. FCC, 492 U.S. 115, 128 (1989) ("Sexual expression which is indecent but not obscene is protected by the First amendment").

Plaintiff Gail Baker testified that Pennsylvania's regulations inhibit her performances because she is required by her employer to wear latex covering over her nipples which dancing and because, when dancing, "I really don't know if what I'm doing is going to be interpreted as illegal – I can move my hips a certain way and maybe, that would be interpreted as illegal." Plaintiff Sabrina Barrar also testified that the law creates "a cloud . . . over my performance, because your rendition of lewd and mine, might be two different things and I feel that it holds back on everything you do as a dancer . . . ."

The plaintiffs are subject to prosecution under an unconstitutional statute, and plaintiffs Barrar and Baker testified that because of their uncertainty as to what the regulation prohibits and their fear of being found in violation, they have had to restrain their performances. Thus, plaintiffs have shown § 4-493(10) to have a "chilling effect on free expression." Hohe v. Casey, 868 F.2d 69, 73 (3d Cir. 1989) (quoting Dombrowski v. Pfister, 380 U.S. 479, 487 (1965)). See also Carandola, 303 F.3d at 521 (citing Elrod v. Burns, 427 U.S. 347, 373 (1976) in support of finding irreparable injury resulting from threat of enforcement of public decency statute).

The majority concludes that the plaintiffs have not shown irreparable injury because there was no real or immediate threat to their own First Amendment rights when they requested a preliminary injunction. Majority at [typescript at 10-11]. The majority also stated:

> It is important to note that the plaintiffs have not made an as-applied argument on appeal, and accordingly they have not shown that the statute likely violates their own First Amendment rights by inhibiting their dancing in the ways noted above. In view of this fact, the fact that the only apparent effects on the dancers are self-imposed, the fact that the statute has not been enforced or threatened to be enforced against the plaintiffs, and the fact that no economic harm has been claimed, we cannot say that the District Court erred in concluding that irreparable harm was not established.

Majority at [typescript at 11].

Even though the plaintiffs may not have made an as-applied argument on appeal, they have shown that § 4-493(10) violates their own First Amendment rights by inhibiting their dancing. Injury to the plaintiffs' own First Amendment rights was both "threatened and occurring at the time of the . . . [plaintiffs'] motion" for a preliminary injunction. Elrod, 427 U.S. at 374. The overbroad nature of § 4-493(10) operates to unconstitutionally constrain the plaintiffs' First Amendment right to free

expression. What the plaintiff dancers say they feel they cannot do may seem trivial to some, but as the District Court noted in the preliminary injunction hearing, it is not trivial to the dancers. Moreover, the plaintiff dancers' fear of being found in violation of § 4-493(10) is reasonable in light of the breadth of the statute. This constraint is the loss of a First Amendment freedom which "unquestionably constitutes irreparable injury." Elrod, 427 U.S. at 373.

Even though § 4-493(10) has not been enforced against the plaintiffs, the defendant admitted in its amended answer to plaintiffs' complaint that the Bureau of Liquor Control Enforcement has cited restaurant and club licensees for violations of § 4-493(10). Moreover, the statute has been enforced in similar circumstances, as shown in Purple Orchid Inc. v. Pennsylvania State Police, 813 A.2d 801 (Pa. 2002). The defendant offered no evidence that it does not intend to cite the plaintiffs for a violation of § 4-493(10), and there is no reason to believe that the defendant will not subject the plaintiffs to the same citations it has issued to other restaurants and clubs if the injunction is not granted. What follows is that, if the plaintiffs' motion for a preliminary injunction is not granted, the defendants are free to enforce this unconstitutionally overbroad statute against the plaintiffs. In light of this reality, it is reasonable to conclude that the plaintiffs are in fact threatened with imminent enforcement of the statute, and therefore face irreparable injury. See 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1160 (2nd Cir. 1974) (finding irreparable

injury because widespread enforcement and attempted enforcement against others constituted threat of imminent prosecution).

The plaintiffs have alleged a loss of First Amendment freedoms, even though an allegation of economic loss alone may have been sufficient to show irreparable injury. See Doran v. Salem Inn, Inc., 422 U.S. 922, 930-931 (1975). In Doran v. Salem Inn, Inc., three businesses that operated bars with topless dancing brought an action challenging an ordinance requiring the dancers to wear bikini tops and sought a preliminary injunction from enforcement of the ordinance. The day after commencing the action, one of the businesses resumed providing topless dancing, and the town served criminal summonses on the business and its dancers for violating the ordinance. The other two businesses complied with the ordinance. Doran, 422 U.S. at 924-925. As to the two complying businesses, the Supreme Court held that the district court did not abuse its discretion when it granted their request for a preliminary injunction because an allegation of loss of business and potential bankruptcy was sufficient to show irreparable injury, even though no state proceedings had been commenced against them. Id. at 930, 932. Here, the plaintiffs have alleged more than economic injury. They have alleged a loss of First Amendment freedoms as a result of an unconstitutionally overbroad statute. Whereas economic loss may have an adequate remedy at law, there is no remedy at law to compensate for the loss of First Amendment freedoms. Thus, the

plaintiffs have satisfied their burden of proving irreparable harm.

Finally, the constraint on the dancers' free expression is not self-imposed. The unconstitutionally overbroad statute places the plaintiff dancers in the unfortunate position of having to choose between exercising their First Amendment rights and facing the prospect of violating § 4-493(10) or changing the way they exercise their First Amendment rights. Whatever the dancers choose, irreparable injury results. The first choice,

> violating the law to exercise one's constitutional rights and awaiting the sure hand of the law—itself may cause . . . irreparable injury both economic (in the form of loss of revenue because customers are fewer and increase in costs due to the difficulty of finding employees willing to risk arrest, prosecution and possible imprisonment) and personal (the freedom to exercise first amendment rights without genuine fear of prosecution).

414 Theater Corp., 499 F.2d at 1160. The second choice also "involves a deprivation of . . . [the plaintiffs'] first amendment rights . . . and in itself constitutes irreparable injury justifying injunctive relief, because there is no means to make up for the irretrievable loss of that which would have been expressed." Id. at 1160.

It is not fair to say that the dancers' restraints are self-imposed when the

unconstitutional statute is responsible for placing the plaintiff's in the position of having to make this choice. The statute's creation of this choice causes irreparable injury when the result, as it is here, is the constraint of First Amendment expression.

The First Amendment right to free speech is "fragile" and "easily chilled." Dolan v. City of Tigard, 512 U.S. 374, 407 (1994) (internal quotation omitted). First Amendment freedoms are "so fundamental that the spectre of punishment, or the uncertainty created by a vaguely worded prohibition of speech, is injurious . . . ." Ruocchio v. United Transportation Union, Local 60, 181 F.3d 376 (3d Cir. 1999) (quoting Mallick v. International Brotherhood of Electrical Workers, 644 F.2d 228 (3d Cir. 1972) (also noting, in the context of standing, that "the possibility of future charges based on the challenged prohibitions, could have a substantial chilling effect on plaintiffs' . . . exercise of their free speech rights"). Once the unconstitutional nature of § 4-493(10) is taken into account, it is clear that plaintiffs' free speech rights have been chilled under the statute's unconstitutional requirement that their performances meet a certain level of propriety.

## III.

For the foregoing reasons, I would reverse the order of the District Court denying plaintiffs' request for a preliminary injunction.

/s/ Jane R. Roth
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

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| CONCHATTA, INC. | : | CIVIL ACTION |
| t/d/b/a CLUB RISQUE ON | : | |
| THE DELAWARE, et al. | : | |
| v. | : | |
| COL. PAUL J. EVANKO, in his | : | |
| official capacity | : | NO. 01-1207 |

MEMORANDUM AND ORDER

Fullam, Sr. J. April 19, 2001

Plaintiff Conchatta, Inc., t/d/b/a Club Risque on the Delaware, is the holder of a restaurant liquor license issued by the Pennsylvania Liquor Control Board. According to plaintiff's brief, plaintiff "operates a gentleman's club in Philadelphia that presents to its patrons constitutionally protected, artistic and erotic striptease dance performances." Plaintiffs Gail Baker and Sabrina Barrar are professional dancers who present "artistic and erotic striptease dance performances" at Club Risque.

Plaintiffs have brought this action challenging the constitutionality of a Pennsylvania statute and related regulations governing holders of liquor licenses in Pennsylvania. Title 47, Pa.C.S.A. §4-493 makes it unlawful...

> "(10) ...for any licensee under any circumstances, to permit in any licensed premises or in any place operated in connection therewith any lewd, immoral or improper entertainment, regardless of whether a permit to provide entertainment has been obtained or not."

And the challenged regulation, 40-§5.32(c) states:

> "(c) A licensee may not permit an employee, servant, agent, event/ tournament/contest participant or a person engaged directly or indirectly as an entertainer in the licensed establishment or a room or place connected therewith, to be in contact or associate with the patrons in the establishment, room or place for a lewd, immoral, improper, or unlawful purpose."

The issue now before the court is whether plaintiffs' application for a preliminary injunction restraining enforcement of the foregoing provisions should be granted. An evidentiary hearing was held on April 5, 2001.

Plaintiffs assert that the quoted statute and regulations impose unconstitutional limitations on plaintiffs' First Amendment rights, and also are impermissibly vague and overbroad. Defendant (who is sued only in his

official capacity, and who will therefore be referred to as the Commonwealth) defends the statute and regulation as permissible exercises of police power aimed primarily at conduct rather than expression, amply justified by the Commonwealth's extensive power over all matters related to the distribution and public consumption of alcoholic beverages.

In deciding whether or not to issue a preliminary injunction, I am required to consider (1) plaintiffs' likelihood of eventual success on the merits, (2) whether plaintiffs would suffer irreparable harm in the absence of injunctive relief, and (3) whether issuing an injunction would best serve, or adversely affect, the public interest. Applying these factors, I have concluded that preliminary injunctive relief should be denied.

It is now entirely clear that nude or semi-nude dancing is a form of expression entitled to protection under the First Amendment. It is also clear that content-based restrictions on the right of expression can rarely be upheld as constitutional. But regulations aimed at conduct rather than expression do not violate the First Amendment even if they may have some incidental impact upon expression. And the Commonwealth's authority to regulate conduct in licensed establishments is extensive. In short, the governing appellate-court precedents present formidable obstacles to plaintiffs' likelihood of success.

In *California v. LaRue*, 409 U.S. 109 (1972) the Court upheld the constitutionality of regulations which prohibited nude and lewd "entertainment" in licensed establishments. In *City of Newport v. Iacobucci*, 479 U.S. 92 (1986) (per curiam) the Court upheld the prohibition of nude or nearly-nude performances in establishments serving liquor. In *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam) the Court upheld the prohibition of topless dancing in such establishments.

In all those cases, the Court relied, at least in part, upon the theory that the states' authority to regulate liquor traffic, granted in the Twenty-first Amendment to the Constitution, gave rise to a strong presumption in favor of the constitutionality of such regulations. Plaintiffs seek to minimize the precedential effect of those cases because, more recently, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, (1996) the Court held that the Twenty-first Amendment does not free states from the need to respect First Amendment rights in the liquor-control setting. But the Rhode Island case dealt with a blanket prohibition on price advertising of liquor — commercial speech in its purest form — not with conduct. In striking down the ban on advertising, the Court made clear that it was not retreating from the holding in *California v. LaRue*, and cited with approval its intervening decisions in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

More recently, in *City of Erie* v. *Pap's A.M.*, 529 U.S. 277 (2000) the Court upheld the City of Erie's total prohibition of public nudity, reversing a decision of the Pennsylvania Supreme Court which had invalidated the ordinance on First Amendment grounds. The case was remanded to the Pennsylvania Supreme Court for consideration of other issues not previously addressed by the Pennsylvania court, including possible over-breadth, and whether the ordinance ran afoul of the Pennsylvania constitution.

My review of the foregoing cases leads to the conclusion that plaintiffs' likelihood of success is uncertain at best. The statute and regulation have been in effect for more than 50 years without successful challenge. It is probable that they should be regarded as primarily directed to conduct, rather than expression, and, to the extent they impact expressive elements in exotic dances, as representing reasonable time, place and manner restrictions, valid under First Amendment jurisprudence.

Plaintiffs have also challenged the statute and regulations on vagueness and over-breadth grounds, focusing on the terms "immoral or improper entertainment" in the statute, and the regulation which states that an entertainer may not "be in contact or associate with the patrons .... for a lewd, immoral, improper or unlawful purpose." On behalf of the Commonwealth, it is argued that any perceived vagueness in these terms does not exert an impermissible "chill" on

First Amendment rights, because of the ready availability of authoritative guidance: Merely by writing to the Liquor Control Board, a licensee or employee can obtain an advance ruling as to the permissibility of proposed activities. Moreover, it is argued, during the lengthy history of these regulations, all concerned have become familiar with what the regulations mean, and what conduct they permit or prohibit, based upon administrative rulings in enforcement proceedings, and the decisions of the courts.

I decline to address these issues, at this juncture, because I believe it appropriate to abstain, in deference to pending state court litigation, under *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941).

This same statute and regulations are being challenged in pending state court litigation. In *Purple Orchid, Inc. v. Pennsylvania State Police*, 721 A.2d 84 (Pa.Cmwlth. 1998), *appeal granted*, 740 A. 2d 1150 (1999) the Commonwealth Court upheld the statute and regulations, and its decision is pending on appeal before the Pennsylvania Supreme Court. In addition, some aspects of similar issues are still pending before the Pennsylvania Supreme Court, after remand from the United States Supreme Court, in the *City of Erie v. Pap's A.M.* case. In these circumstances, the preferred course is to defer to the state courts for a final ruling on the proper interpretation of the statute and regulations.

In my view, the only issue it is appropriate for this court now to consider is whether, pending the state courts' action, plaintiffs are likely to suffer irreparable harm which should be prevented by preliminary injunctive relief. On the basis of the evidentiary record, I am not convinced that any significant harm will be sustained by any of the plaintiffs. So far as the record discloses, the plaintiffs have never been cited for violating the statute or regulations, and there is no imminent threat of such action. The only evidence presented at the hearing was to the effect that the two dancers would prefer to be allowed to dance without any covering on their nipples, and the club would prefer to present that form of entertainment to its customers. Whether there is any cognizable difference in self-expression between what the individual plaintiffs are now doing and what they say they would prefer is indeed problematic. If there is a difference, I am satisfied that it represents such a minimal restriction on their right of self-expression that it may safely be ignored as a basis for interim injunctive relief.

And, while the public presumably has some vague interest in the preservation of everyone's First Amendment rights, the interests at stake here are relatively marginal, and I am not persuaded that withholding injunctive relief, particularly in view of the slim likelihood of success on the merits, would adversely affect the public interest.

For all of the foregoing reasons, the application for a preliminary injunction will be

denied, and all further proceedings in this action will be stayed in deference to the pending state-court litigation.

An Order follows.

IN THE UNITED STATES DISTRICT COURT
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| official capacity | : | NO. 01-1207 |

ORDER

AND NOW, this 19th day of April 2001, IT IS ORDERED:

1. Plaintiffs' application for a preliminary injunction is DENIED.

2. All further proceedings in this case are STAYED, pending the decision of the Pennsylvania Supreme Court in the litigation referred to in the accompanying Memorandum.

3. The Clerk is directed to close the file administratively. This case may be re-opened upon application by any of the parties after final decision of the state-court appeals.

/s/ John P. Fullam
John P. Fullam, Sr. J.